90-591

No. 90—

Supreme Court, U.S.
FILED
OCT 4 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

WILLIAM B. YOUNG, JR., *et al.*,

Petitioners,

v.

NEW YORK CITY TRANSIT AUTHORITY, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

The administrators of New York City's subways have banned "begging and panhandling" throughout the subway system. At the same time, they have expressly permitted in many parts of the system solicitation for other charitable, religious, and political causes. The decision to ban charitable solicitation for oneself while permitting charitable solicitation for others raises the following questions.

1. Is the solicitation of charity for one's own needs speech that is protected by the First Amendment to the United States Constitution?

2. May a public agency designate the forum it regulates as a public forum for the solicitation of charity for others but not for oneself?

3. Can a regulation that distinguishes among different types of solicitation be sustained as content-neutral in the face of First and Fourteenth Amendment challenges? The United States Courts of Appeals have disagreed on this issue.

4. Under *Ward* v. *Rock Against Racism*, 109 S. Ct. 2746 (1989), may a court determine that a regulation is narrowly tailored to achieve a legitimate governmental objective without inquiring whether the regulation burdens substantially more speech than necessary? The United States Courts of Appeals have disagreed on this issue.

LIST OF PARTIES

The Petitioners in this action are William B. Young, Jr. and Joseph Walley, suing on behalf of themselves and all other persons who are similarly situated, and the Legal Action Center for the Homeless.

The Respondents in this action are the New York City Transit Authority, the Metropolitan Transportation Authority of the State of New York, and Robert Kiley, in his capacity as Chairman of each of those agencies.

The following defendants, who were joined only in connection with an issue no longer present in this action, are no longer participating in this case. The Port Authority of New York and New Jersey, Metro-North Commuter Railroad Company, the Long Island Rail Road Company, Robert Abrams, as Attorney General of the State of New York, and, as the Board of Commissioners of the Port Authority of New York and New Jersey, Philip D. Kaltenbacher, Chairman, Robert F. Wagner, Sr., Vice-Chairman, Hazel Frank Gluck, James G. Hellmuth, Henry F. Henderson, Jr., William K. Hutchison, Richard C. Leone, Basil Patterson, John G. McGoldrick, William J. Ronan, Howard Schulman, and Robert Van Buren.

Intervenor Sheron Gilmore was a party to the action until her death on September 7, 1990.

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In the

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October Term, 1990

No. 90-

WILLIAM B. YOUNG, JR., *et al.*,
Petitioners,

v.

NEW YORK CITY TRANSIT AUTHORITY, *et al.*,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners William B. Young, Jr., Joseph Walley, Legal Action Center for the Homeless, and a class of needy persons who solicit charity for their own needs in the New York City transit system, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered May 10, 1990.

OPINIONS BELOW

The District Court's opinion is reported at 729 F. Supp. 341 (S.D.N.Y. 1990). The Court of Appeals' opinion is reported at 903 F.2d 146 (2d Cir. 1990); its denial of rehearing has not been reported.

JURISDICTION

The judgment of the Court of Appeals was entered on May 10, 1990. Petitions for Rehearing with Suggestions for Rehearing En Banc were timely filed and were denied on July 6, 1990. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

U.S. Const. amends. I and XIV.

N.Y. Comp. Codes R. & Regs. tit. 21, § 1050.6 (1990).

N.Y. Comp. Codes R. & Regs. tit. 21, § 1050.7 (1990).

STATEMENT OF THE CASE

Petitioners brought this case to challenge a total ban on begging in New York City's subways. An advocate for the homeless is expressly permitted to use subway facilities to solicit charity for the homeless generally, but a homeless person may not use those same facilities to solicit charity directly for himself or herself. Petitioners have acknowledged throughout this action that begging in the subway, like other forms of solicitation, may be subjected to reasonable time, place, and manner restrictions. But petitioners maintain that a total ban on begging unconstitutionally excludes disfavored speech from a public forum.

In August 1989, respondents Metropolitan Transportation Authority ("MTA") and New York City Transit Authority ("NYCTA") adopted new rules for New York City's subways. The rules specifically authorize public

speaking, religious and political solicitation, solicitation for artistic performances, and solicitation by registered charities. *See* N.Y. Comp. Codes R. & Regs. tit. 21 ("21 N.Y.C.R.R.") § 1050.6(c)(1) (1990); E1-6.[1] But they also expressly provide, after having been clarified by amendment, that "[n]o person shall panhandle or beg upon any facility or conveyance." *Id.* Anyone who begs in the subway system, respondents stated in leaflets explaining their rules, "will be subject to arrest, fine and or ejection." *See* B2-3, B6.

The sole practical effect of respondents' total ban on begging is to prohibit begging that is both peaceful and unintrusive. If respondents had subjected begging to the same regulations as other forms of charitable solicitation, begging would not have been suppressed completely; it would instead have been prohibited only when it was actually accompanied by antisocial behavior or occurred in the particular parts of the subway facilities where all forms of solicitation are likely to interfere with the system—*i.e.*, whenever it had "the reasonably intended effect of annoying, alarming or inconveniencing others," and whenever it took place on subway cars, within twenty-five feet of the token booths, near staircases or escalators, or in any place that impeded or interfered with the movement of passengers. *See* 21 N.Y.C.R.R. §§ 1050.6, 1050.7(i)(1990); E1-7.

Two homeless men, Joseph Walley and William Young, brought this action to challenge respondents' total ban on begging under the First and Fourteenth Amendments to the United States Constitution, 42 U.S.C. §§ 1981, 1983, and

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[1] References to materials in the Appendix that accompanies this petition appear as "[Letter] —" according to the page number in the relevant segment of the Appendix.

1988, and New York state law. Joined by the Legal Action Center for the Homeless, they sued the MTA and NYCTA on behalf of themselves and a class of individuals who solicit charity for their own needs in New York City's subway stations and passageways.[2] Sheron Gilmore, a woman who begged in subway facilities to provide herself with food and other necessities, intervened.[3] *See* B1-5.

The District Court held that respondents' ban on begging was unconstitutionally overbroad, and enjoined respondents from enforcing it. The court reasoned that begging is entitled to the same First Amendment protection that this Court has consistently extended to solicitation for organized charities because "a meaningful distinction cannot be drawn" between them. B19-22. The District Court also held that respondents had designated at least some parts of the subway system as a public forum for the solicitation of alms by allowing solicitation for political causes, religious causes, and registered charities. B32-37. Finally, the court held that respondents' total ban on begging was unconstitutional

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[2] Petitioners also sought to invalidate a New York Penal Law that bars loitering "for the purpose of begging" in all public places. N.Y. Penal Law § 240.35(1) (McKinney 1989). The District Court invalidated the Penal Law under New York state law. The Court of Appeals vacated the District Court's judgment for lack of jurisdiction, and petitioners have chosen not to seek review of that ruling. For this reason, the defendants who were joined for purposes of litigating the Penal Law issue are no longer parties to this case, so the MTA, NYCTA, and Robert R. Kiley as the Chairman of each, are the sole respondents.

[3] On October 1, 1990, counsel to Ms. Gilmore was informed by a New York City social worker that Ms. Gilmore had died on September 7, 1990.

because it was not narrowly tailored to serve a legitimate governmental interest. B37-40. Indeed, the District Court found that respondents had made "no effort" to tailor their ban narrowly. B40. It therefore concluded that "the total prohibition of *all* begging on *all* of [respondents'] facilities . . . is constitutionally impermissible," but emphasized that this holding was "without prejudice to the adoption by [respondents] of reasonable time, place and manner of exercise restrictions." B41-42 (emphasis in original).

After rendering its decision, the District Court made its injunction permanent, entered partial judgment under Federal Rule of Civil Procedure 54(b), and placed on its suspense docket all challenges to respondents' ban as applied to plaintiffs. D1-4.

In a split decision, the United States Court of Appeals for the Second Circuit reversed. The court rejected the District Court's view that begging is indistinguishable from solicitation for other forms of charity because "[w]hile organized charities serve community interests by enhancing communication and disseminating ideas, the conduct of begging and panhandling in the subway amounts to nothing less than a menace to the common good." A23. This theme resonated throughout the majority opinion, which described begging in the subway as "inherently harmful," "intimidating," "threatening," "transgressive conduct," and "harassing." A18, A22, A25.

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[4] The majority's denunciation of begging and its apparent assumption that begging can never be peaceful or unintrusive were inconsistent with uncontradicted record evidence that petitioners conducted peaceful solicitation for themselves. *See* F2-3, F7-8, F11.

[Footnote continued on following page]

The Court of Appeals went on to state that whether "begging and panhandling constitute protected expressive conduct . . . is in serious doubt," A35, because "begging is not inseparably intertwined with a 'particularized message.'" A17 (quoting *Spence* v. *Washington*, 418 U.S. 405, 411 (1974)). Nevertheless, the court said it was assuming for purposes of deciding the case that begging is protected "expressive conduct," A16-20, and would therefore analyze respondents' ban under the "relaxed" standard set forth in *United States* v. *O'Brien*, 391 U.S. 367 (1967). A25-27.

The court apparently assumed for purposes of its decision that New York City's subways are a public forum, but nonetheless explained at length why they are not. *See* A35-37. In the court's view, *Gannett Satellite Information Network, Inc.* v. *Metropolitan Transp. Auth.*, 745 F.2d 767 (2d Cir. 1984), an earlier case concerning newsracks bolted into the platforms of commuter railway stations, had determined that the subways are not a traditional public forum. In addition, respondents had

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The District Court and Judge Meskill in dissent also emphasized that begging could be peaceful. *See* B38, A45-46. The majority relied for its assertions to the contrary on a Transit Authority survey of rider attitudes. But the survey was never admitted as evidence; it was simply delivered to the District Court to show that a discovery dispute had been resolved. In any event, the survey was an inadequate basis for factual findings about begging in general because it did not canvass passengers about their views of peaceful begging conducted within the limits set for other kinds of solicitation. Instead, the survey reflected passenger attitudes about begging that occurred on subway cars, stairs, and on narrow platforms because respondents did not enforce the time, place and manner regulations that petitioners concede can constitutionality be applied to begging.

not designated the subways as a public forum for begging, according to the Court of Appeals, because even though their regulations permitted other types of solicitation for charitable causes, including solicitation on behalf of the needy, "the [NYCTA] never intended to designate sections of the subway system . . . as a place for begging and panhandling." A37.

Finally, the Court of Appeals held that respondents' total ban "more than satisfies" the requirements of *O'Brien* and is a reasonable time, place, and manner regulation. A35. Respondents' ban is content-neutral, the court held, because its explicit distinction between solicitation for oneself and solicitation for others was not directed at the content of beggars' speech. A29-31. The court also found respondents' ban to be narrowly tailored to the government's legitimate objectives for three reasons. First, the court held that under this Court's precedents the existence of a less restrictive alternative is no longer a basis for invalidating overbroad regulations. A31-33. Second, the court held that respondents' ban is narrowly tailored under *Ward* v. *Rock Against Racism*, 109 S. Ct. 2746 (1989) because it furthers the government's objectives. A27-29, A33. Finally, the court held that respondents' ban left open ample alternative channels of communication because beggars can beg outside the subway system. A33-34.

Judge Meskill dissented from the decision insofar as it upheld respondents' ban on begging. Judge Meskill declined to adopt the majority's characterization of begging as a "menace" and noted that respondents had made "no showing . . . that passengers perceive all, or even a large percentage of people who solicit alms in the subway as belligerent or frightening." A52. He added, "I simply fail to see why the [NYCTA] should be able to permit

organized charities, but not beggars, to rattle a cup full of change as one passes by." A53. Judge Meskill disagreed with the majority's conclusion that the subway system was not a public forum, A48-50, and concluded that respondents' regulations impermissibly infringe upon petitioners' First Amendment rights because "[t]he complete ban on begging . . . burdens substantially more speech than necessary, and therefore is not narrowly tailored to achieve the government's interests." A50-52.

Petitioners and Ms. Gilmore filed Petitions for Rehearing with Suggestions for Rehearing En Banc. The Petitions were denied and, with Chief Judge Oakes and Judges Meskill, Newman, and Kearse dissenting, the Second Circuit voted not to reconsider the decision en banc. C1-2.

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals' Decision Conflicts With this Court's Repeated Holdings that Charitable Solicitation Is Speech Protected by the First Amendment.

This Court has consistently held that soliciting donations is speech fully protected by the First Amendment. *See Riley* v. *National Fed'n of the Blind,* 487 U.S. 781 (1988); *Secretary of State* v. *Joseph H. Munson Co.,* 467 U.S. 947 (1984); *Village of Schaumburg* v. *Citizens for a Better Environment,* 444 U.S. 620 (1980). Last term, the Court reaffirmed this holding in *United States* v. *Kokinda,* 110 S. Ct. 3115 (1990). The Court's cases " 'long have protected speech even though it is in the form of . . . a solicitation to pay or contribute money.' " *Schaumburg,* 444 U.S. at 633 (citation omitted) (quoting *Bates* v. *State Bar,* 433 U.S. 350, 363 (1977)). This Court has

never specifically decided, however, whether the First Amendment right to solicit charity includes the right to solicit charitable contributions for one's own needs.

A. Whether Begging Is Speech Is an Issue of Great and Continuing National Importance that this Court Should Resolve Promptly.

There are many people who have no choice but to solicit alms from others. As the District Court recognized, this is a social problem that has persisted throughout history. *See* B25-32. Those who can provide for themselves should do so, but there have always been and will always be some members of society who simply cannot fend for themselves. *See* H.R. Rep. No. 558, 100th Cong., 1st Sess. 17-20, 57, *reprinted in* 1987 U.S. Code Cong. & Admin. News 362-66, 395 (legislative history of the Homeless Assistance Act). For those who cannot cope on their own, the necessities of life that most of us take for granted are wanting. Organized public and private attempts at assistance fall short, often because these individuals are unable to take advantage of them. These citizens must, and they do, appeal to others for charity. They can do so effectively only in the great public spaces of urban America through which large numbers of people pass, such as public streets, sidewalks, and in this case, the New York City subway system.

At the same time that this great need exists, some states ban begging by statute, and others regulate it without banning it completely. Twenty-five states have statutes that restrict begging. The District Court reviewed the relevant legislative field. B26-28.

> Thirteen of these statutes do not proscribe begging but grant power to various authorities within the

state to regulate and punish begging or some variation.[5] Two statutes adopt the old common law rule and prohibit begging only by those able to work.[6] Four additional statutes resemble the New York penal provision and prohibit loitering for the purpose of begging.[7] The remaining states proscribe either begging or a form of activity analogous to begging.[8]

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[5] Ark. Stat. Ann. § 14-54-1408 (1987) (City Council authorized to punish begging); Ill. Ann. Stat. ch. 24 para. 11-5-4 (Smith-Hurd 1962) (Corporate authority of each municipality); Mont. Code Ann. § 7-32-4304 (1989) (City and town council); Neb. Rev. Stat. § 14-102, cl. 23 (1987) (Cities of Metropolitan class); N.H. Rev. Stat. Ann. § 47:17, cl. XIII (Equity Publishing 1971) (City council); N.C. Gen. Stat. § 160A-179 [1982] (City); N.D. Cent. Code § 40-05-01, cl. 43 ([Supp.] 1989) (Municipalities); Ohio Rev. Code Ann. § 715.55 (Anderson 1966) (Municipal Corporations); Utah Code Ann. § 10-8-51 (1989) (City); Wash. Rev. Code Ann. § 35.22.280 [(34)(1990)] (First class cities); W. Va. Code § 8-21-10 ([1990]) (Board of Parks and Recreation Commission); Wyoming Sta. § 15-1-103 cl. (a)(xvii) ([Supp. 1990]) Government bodies of all cities and towns given authority to restrain and punish "vagrancy, medicants and prostitutes"); N.J. Stat. Ann § 40:48-1(7) (West [Supp. 1990]) (Governing body of every municipality).

[6] La. Rev. Stat. § 14:107 (West 1986) (prohibits vagrancy, which is defined as begging or solicitation of alms by able bodied persons, though not begging or soliciting for "bona fide" religious and charitable organizations); Miss. Code Ann. § 97-35-37 (1972) (punishes vagrants, defined as able-bodied persons who beg for a livelihood).

[7] Ariz. Rev. Stat. Ann. § 13-2905(A)(3) (1989); Colo. Rev. Stat. § 18-9-112(2)(a) (1986); Del. Code Ann. tit. 11 § 1321(4) (1987); Ala. Code § 13A-11-9(a)(1)(1982).

[8] Kan. Stat. Ann. § 21-4108 (1988) (prohibits vagrancy, which is defined as deriving "support in whole or in part from begging"); Minn. Stat. Ann. § 609.725 (West 1987) (same); Wisc. Stat. Ann. § 947.02(4) (West 1982) (same); Vt. Stat.

[Footnote continued on following page]

Whatever the motives behind their enactment, these laws, and other government efforts to keep people who must beg away from those who might respond to their message of need, pose a significant danger to society's interest in ensuring that the views of the poor are heard. If state and local governments can ban begging in all public places without satisfying the requirements of the First Amendment, they will be able, as the District Court pointed out below, to "keep a public problem involving human beings out of sight and therefore out of mind." *See* B39.

B. The Rights Petitioners Ask this Court To Protect Are Substantial First Amendment Rights.

The rationale of *Schaumburg*, *Munson*, and *Riley* leaves little doubt that begging is protected speech. Like the charitable solicitation at issue in *Schaumburg*, requesting contributions to support oneself "involve[s] a variety of speech interests—communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes—that are within the protection of the First Amendment." *Schaumburg*, 444 U.S. at 632. The First Amendment protects the rights of one who speaks on behalf of a beggar, even if the spokesperson has no

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Ann. tit. 13, § 3901 (1974) (vagrancy defined as transient person living without visible means of support who begs); Mass. Ann. Laws Chap. 272. §§ 63 & 64 (Law. Co-op. 1980) (punishes tramps, which are described as persons begging or soliciting alms and having no residence in town within which act is committed); Mich. Comp. Laws Ann. § 750.167 (West [Supp. 1990]) (punishes disorderly person which is defined as any person found begging in public place). *See also* N.J. Stat. Ann. § 32:1-146.6 (West [1990]) (codifying Port Authority rule which prohibits any person "unless duly authorized by the Port Authority. . . . (from) solicit[ing] alms").

motive for speaking other than a professional fundraiser's desire for a commission that will be deducted before the proceeds go to the needy. Surely the First Amendment also protects the purest form of the message such a spokesperson would deliver, by protecting the beggar's right to speak directly on his or her own behalf. As Judge Meskill wrote in this case, "[t]o hold otherwise would mean that an individual's plight is worthy of less protection in the eyes of the law than the interests addressed by an organized group. No court has ever so ruled." A49.

Soliciting contributions for oneself is inherently communicative speech. One human being says to another, "I need money to live. I have no way to get it other than to ask for help. Please give to me." At its core, that is the message from every person who solicits for his or her own needs. That it is a simple message, delivered directly and in a way that may bring the listener face to face with the circumstances of the beggar's life, does not in any way detract from the communicative nature of the speech. Rather, as the District Court observed, these characteristics enhance the power of the message conveyed. "While often disturbing and sometimes alarmingly graphic, begging is unmistakably informative and persuasive speech. . . . Although the beggar's entreaties may be more personal, emotionally charged and highly motivated [than those of organized charities], the substance is in essence a plea for charity." B23.

The individual expression of need is also inextricably intertwined with political expression and comment, as the record in this case confirms. Plaintiff William Young states that people often ask him why he solicits contributions, and he explains:

> [S]ocial services in New York City are designed to keep people in—designed to maintain and contain —and are not designed to help them get back on their feet. I tell them you can waste a whole day trying to speak with a bureaucrat, who only gives you a few moments of his time and then refers you elsewhere, with nothing accomplished. I tell them that the public shelters are dangerous places, where violence often occurs and the few belongings I have might easily be stolen.

F3.

Sheron Gilmore stated that her "request for money, in addition to being a means of support, is a way in which I communicate my belief that the government is not doing enough to protect poor citizens and provide them with food and shelter." F11. She added,

> Frequently, my solicitation is the start of a conversation between myself and the person who hears it. I am often asked by people why I have to solicit money in this way, and why the government is not taking care of poor people. People often want to know where their tax money is going, since so many people are clearly not being taken care of. I have engaged in many political discussions, sometimes for up to an hour, that started from my initial request for money.

F11-12.

Speech of this kind cannot be expressed by organizations. An organization speaks abstractly and impersonally, whereas petitioners' message is considerably more immediate. It is the difference between "There are hungry people" and "I am hungry." The courts have recognized the unique com-

municative value of speech delivered in a personal way. *See, e.g., City of Watseka* v. *Illinois Pub. Action Council*, 796 F.2d 1547, 1558 (7th Cir. 1986) ("In granting First Amendment protection to door-to-door solicitation and canvassing, the Supreme Court has implicitly recognized that door-to-door communication has a special significance not duplicated by less personal forms of contact"), *aff'd mem.*, 479 U.S. 1048 (1987). A rule that the poor must express their need through an organizational intermediary would place important and unique expression outside the protection of the First Amendment.

Petitioners' request for money is as protected by the First Amendment as the rest of their message. This Court has expressly held that regulation of the solicitation of charity implicates First Amendment rights as much as a regulation that restricts only informational statements made in conjunction with such a solicitation. *See, e.g., Riley*, 487 U.S. at 796 (refusing "to separate the component parts of charitable solicitations from the fully protected whole"). In *Schaumburg*, 444 U.S. at 628, the court expressly rejected the notion that solicitation of money can be separated out from the dissemination of information:

> It is urged that the ordinance should be sustained because it deals only with solicitation and because any charity is free to propagate its views from door to door in the Village without a permit as long as it refrains from soliciting money. But this represents a far too limited view of our prior cases relevant to canvassing and soliciting by religious and charitable organizations.

Moreover, as the *Schaumburg* court stated, in words that are equally applicable to this action, "the reality [is] that without solicitation the flow of . . . information and advo-

cacy [regarding economic, political, or social issues] would likely cease." *Id.* at 632. *See also Cornelius* v. *NAACP Legal Defense and Educ. Fund*, 473 U.S. 788, 799 (1985).

The Court of Appeals' statement that the prohibition on begging is merely a "proscription of conduct," *see* A31, is inconsistent with common experience and with this Court's solicitation cases. As noted above, begging is communicative, and its message "is characteristically intertwined with informative and perhaps persuasive speech seeking support . . . for particular views on economic, political, or social issues." *Schaumburg*, 444 U.S. at 632. To whatever extent begging may be viewed as including conduct, one simply cannot deny that it also conveys a powerful emotional, moral and intellectual message. In *Martin* v. *City of Struthers*, 319 U.S. 141, 142 (1943), and its progeny, this Court held that the acts of walking onto property owned by another and ringing a doorbell "or otherwise summon[ing] the [residents] to the door" are part of the solicitation process and hence protected speech. *See also Schaumburg*, 444 U.S. at 620; *Hynes* v. *Mayor of Oradell*, 425 U.S. 610, 616 (1976). If the acts of walking onto private property and ringing a doorbell are integral parts of expression, so is the simple act of speaking to another person in the subway while one's hand is held out for a donation.

II. Respondents' Regulation Cannot Be Sustained on the Ground that the Subway System Has Been Designated as a Forum for Solicitation for Political, Religious and Charitable Causes, But Not for the Solicitation of Charity for Oneself.

Speech is entitled to full First Amendment protection in a public forum. Respondents sought to justify the constitution-

ality of their regulation by contending that the subway system was not a public forum, even the parts of it that had been opened up to speech other than begging. In respondents' view, the regulation's selective exclusion of begging was constitutionally permissible because the system's administrators did not intend to designate the system as a forum for begging. In effect, respondents sought to use the "limited purpose" public forum doctrine to support the exclusion of speech by arguing that a designated public forum can be limited to the uses the government favors. The Court of Appeals adopted this analysis. A35-37. This case therefore presents the question of how far a public agency may go in ignoring the public character of the forum it regulates. If this Court does not define clearly the limits on the government's ability to control speech in a public forum by claiming it has not designated the forum as one for disfavored speech, the "limited-purpose" doctrine will become a device for undermining rather than protecting First Amendment interests.

The subways are a public forum for expressive activities by both tradition and statutory designation. This Court has long held that public streets are a traditional public forum "held in trust for . . . communicating thoughts between citizens." *Hague* v. *CIO*, 307 U.S. 496, 515 (1939) (plurality opinion). Large portions of New York City's subways are functionally indistinguishable from public streets. The hundreds of subway stations and the many miles of corridors and other open areas are public thoroughfares through which millions of people pass each day. Although some areas of the subway system may be too confined to be appropriate for public expression, those areas are not open to solicitors generally and are therefore not the ones to which petitioners seek access.

Moreover, New York City's subways have been designated as a public forum by statute. New York Rapid Transit Law § 31(e) (McKinney 1942) provides that the subways "shall be and be deemed to be a part of the public streets of the city, to be used and enjoyed by the public subject to such reasonable rules and regulations as may be imposed." Thus, because public streets are quintessential public forums, New York City's subways must be deemed to be a public forum by statutory designation as well as by tradition.

Respondents have reinforced the public qualities of the subway system by explicitly authorizing a wide range of expressive activities, including solicitation for political causes, religious causes, and registered charities. *See* 21 N.Y.C.R.R. § 1050.6. They have imposed reasonable restrictions on such activities, but in the areas open for speech, virtually all solicitation except begging is permitted. This Court has recognized that when the government opens a non-traditional forum for some types of public expression, it automatically opens the forum for other "similar" forms of expression. *See Perry Educ. Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 48 (1983).

In *United States* v. *Kokinda*, 110 S.Ct. 3115 (1990), Chief Justice Rehnquist and Justices White, O'Connor, and Scalia suggested that the government might be able to open a non-traditional forum for some types of expression without opening it to all similar types of expression. These Justices held that the post office sidewalk at issue in *Kokinda* was not a public forum because "[t]he Postal Service ha[d] not expressly dedicated its sidewalks to any expressive activity." *Id.* at 3121. As an alternative holding, however, these Justices suggested that the government may adopt a policy of "selective access" and exclude disfavored

expression subject only to the requirements of reasonableness: "[e]ven conceding that the forum here has been dedicated to some First Amendment uses, and thus is not a purely non-public forum . . . , regulation of the reserved non-public uses would still require application of the reasonableness test." *Id.*

But *Kokinda* did not overrule *Perry*. And none of the opinions in *Kokinda* could justify the Court of Appeals' endorsement in this case of a policy of "selective access" under which respondents "limit solicitation in the subway system to organizations" merely because they intended to exclude begging when they opened the subways to solicitation for other causes. A36-37. Even beyond the subway system's inherently public character, application of the *Perry* test leads to the conclusion that when the regulations allow charitable, religious, and political solicitation, they establish a public forum for begging. As Judge Meskill wrote, respondents "may not open the door to [the interests addressed by an organized group] while slamming it in the face of [an individual's plight]." A49.

III. The Court of Appeals Upheld as Content-Neutral a Regulation that Discriminates on the Basis of the Content of Speech.

The appropriate test of content neutrality is critical in First Amendment jurisprudence because determining that a regulation is content-neutral will often dictate the outcome of the case. If a regulation of speech in a public forum is not content-neutral, it can be upheld only if it is the least restrictive means of accomplishing the government's legitimate ends. *See Sable Communications, Inc.* v. *FCC*, 109 S. Ct. 2829, 2836 (1989). Content-neutral

regulations typically will be subjected to lesser scrutiny. *See, e.g., Ward,* 109 S. Ct. at 2753.

A regulation is not content-neutral if it "[o]n its face . . . accords preferential treatment to the expression of views on one particular subject." *Carey* v. *Brown,* 447 U.S. 455, 460-61 (1980). In this case, respondents' regulation expressly authorizes "solicitation for religious or political causes" and "solicitation for charities" that meet certain registration or licensing requirements. 21 N.Y.C. R.R. § 1050.6(c)(1). At the same time, the regulation expressly prohibits "begging and panhandling." *Id.* As a result, an individual who represents a charity that the NYCTA has approved for solicitation may place a cup at her feet on subway facilities and hold a sign that says "help the homeless," but if the indivdual acts on her own, and the sign says, "help me, I'm homeless," she will be subject to arrest.

The respondents singled out begging for disfavored treatment because of their conviction that a stranger's request for money for herself is inherently threatening and intimidating, while a stranger's request for money for someone else is not. In respondents' view the words "give to me" are alarming but the words "give to my charity" are innocuous. It is difficult to imagine a clearer example of a regulation that accords "preferential treatment" to the expression of views on one particular subject. *See Carey,* 447 U.S. at 460-61; *see also Regan* v. *Time, Inc.,* 468 U.S. 641, 648-49 (1984); *Police Department of Chicago* v. *Mosley,* 408 U.S. 92, 100-102 (1972).

The Court of Appeals nevertheless held that respondents' complete ban on begging in their facilities is content-neutral. The court began its analysis by quoting *Ward's*

statement that "[t]he principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." A29 (quoting *Ward*, 109 S. Ct. at 2754). The court then stated immediately and without explanation that "[f]acially, [21 N.Y.C.R.R.] § 1050.6 of course, has nothing to do with a restriction on expression." A29. Next, the court identified as "the real question . . . whether the dangers relied on as justification for the regulation arise . . . from the alleged communicative content of the conduct." *Id.* Finally, the court concluded that respondents' ban on begging is content-neutral because it is a "proscription of conduct for reasons completely unrelated to the alleged communicative impact of the conduct." A31.

In effect, the Court of Appeals appears to have held that *Ward* overruled *Regan* and *Mosley* by implication. This is an error that should be corrected promptly, not only because it is a significant misapplication of this Court's First Amendment and Equal Protection precedents, but also because the Court of Appeals has set itself at odds with the Court of Appeals for the Tenth Circuit, which has held comparable restrictions on solicitation to be content-based on their face.

In *ACORN* v. *Municipality of Golden, Colorado*, 744 F.2d 739 (10th Cir. 1984), the court had before it an ordinance that prohibited all door-to-door solicitation unless the city manager provided an exemption. The city manager was directed to issue an exemption if the city council determined that the solicitation was for a "charitable, religious, patriotic or philanthropic purpose or otherwise provides a service or product so necessary for the general welfare of the residents of the city that such activity

does not constitute a nuisance." *See id.* at 741. ACORN, which conducted door-to-door canvassing to inform people about its work as an organizer of low and moderate income people on issues such as opposition to proposed utility rate increases, to encourage people to sign petitions, and to solicit donations, did not apply for an exemption. When the municipality confirmed its intention to enforce the ordinance, ACORN filed suit. In holding the ordinance unconstitutional, the Tenth Circuit expressly found the regulation to be content-based.

> Golden's ordinance, however, is not content neutral. The ordinance permits exemptions for organizations or individuals if the purpose of the solicitation is for a charitable, religious, patriotic or philanthropic purpose, or otherwise provides a service so necessary for the resident's general welfare that it does not constitute a nuisance. This approach contemplates a distinction based on content.

Id. at 749. This is precisely the issue that confronted the Court of Appeals in this case, but the result reached was the opposite.

IV. In Holding that a Regulation Is "Narrowly Tailored" Whenever It Furthers the Government's Purpose, Rather than Only When It Does Not Burden Substantially More Speech than Necessary, the Court of Appeals Misconstrued *Ward* v. *Rock Against Racism* and Confirmed a Disagreement on this Point Among the United States Courts of Appeals.

In *Ward,* this Court established a two-part test to determine whether a regulation is narrowly tailored to advance a

legitimate governmental objective. "[T]he requirement of narrow tailoring is satisfied," the Court held initially, " 'so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.' " *Id.* at 2758 (quoting *United States* v. *Albertini*, 472 U.S. 675, 689 (1985)). The Court added, however, that "this standard does not mean that a time, place or manner regulation may burden substantially more speech than necessary to further the government's legitimate interests." *Id.; see also Board of Trustees* v. *Fox*, 109 S. Ct. 3028, 3034 (1989) (reaffirming second requirement of *Ward*); *Schad* v. *Borough of Mount Ephraim*, 452 U.S. 61, 70 (1981) (holding that courts must examine less restrictive alternatives).

The Court of Appeals applied only the first part of *Ward*'s two-part test. It expressly held that *Ward* controlled the issue whether respondents' regulations were narrowly tailored to their objectives, but while it quoted the first part of *Ward*'s test three times, it completely ignored the second part.

The Court of Appeals' interpretation of *Ward* eliminates any effective narrow tailoring requirement from First Amendment jurisprudence. The court read *Ward* to hold that so long as a regulation furthers a substantial government interest in some way, it is, without more, narrowly tailored to that interest. As a result, insignificant but measurable progress toward government goals can be purchased with enormous burdens on speech, and the courts are forbidden to ask whether those burdens are disproportionate to the progress achieved. For example, a city-wide ban on leafleting could be upheld because it would help to reduce litter. Moreover, the effect of this elimination of the narrow tailoring requirement is dramatically illustrated by the instant case; the Court of Appeals held that respon-

dents' ban on begging was narrowly tailored even though the District Court found that respondents had made "no effort" to tailor their regulations narrowly. B40.

This Court should grant certiorari not only because the Court of Appeals eliminated half of the test established in *Ward*, but also because the federal courts are divided on whether the analysis used by the Court of Appeals in this case was correct. Several courts, like the Court of Appeals below, have failed to apply the second part of *Ward*. *See Collinson* v. *Gott*, 895 F.2d 994, 1003 (4th Cir. 1990); *Doe* v. *City of Minneapolis*, 898 F.2d 612, 618-19 (8th Cir. 1990); *Jones* v. *Heyman*, 888 F.2d 1328, 1333-34 (11th Cir. 1989). In addition, in a case decided soon after this one, the Court of Appeals for the Second Circuit paraphrased the second part of *Ward* and appeared to apply it, but nonetheless held that analysis of less restrictive alternatives "has no part in the review of a time, place or manner regulation." *Carew-Reid* v. *Metropolitan Transp. Auth.*, 903 F.2d 914, 918 (2d Cir. 1990).

The Court of Appeals for the District of Columbia Circuit, however, has expressly interpreted and applied both parts of the *Ward* test. In *Community for Creative Non-Violence* v. *Turner*, 893 F.2d 1387, 1389 (D.C. Cir. 1990), the Washington Metropolitan Area Transit Authority ("WMATA") required that all persons wishing to engage in "free speech activities on WMATA property" obtain a permit. The Court of Appeals held that this requirement failed the narrow tailoring test.

> Although WMATA's stated interests are achieved *more effectively* with the regulation than without it, the permit requirement also restricts many incidents of free expression that pose little or no threat

> to WMATA's ability to provide safe and efficient transportation and an equitably available forum for public expression. . . . While the Regulation arguably eliminates the "sources of evil" that allegedly threaten WMATA's ability to provide a safe and efficient transportation system, it does so at too high a cost, namely, by significantly restricting a substantial quantity of speech that does not impede WMATA's permissible goals.

Id. at 1392 (emphasis in original); *see also Clarke* v. *United States*, 886 F.2d 404, 414 & n.8 (D.C. Cir. 1989).

This disagreement concerning the interpretation of *Ward* is particularly likely to cause confusion when, as in the instant case, the regulation at issue is a total ban. *Ward* can be read to prescribe any of three different tests for determining whether a total ban is narrowly tailored to the government's objectives. First, *Ward* can be read to permit total bans only when " 'each activity within the proscription's scope is an appropriately targeted evil.' " *Ward*, 109 S. Ct. at 2758 (quoting *Frisby* v. *Schultz*, 487 U.S. 474, 485 (1988)). Second, *Ward* can be read to permit bans whenever they do not "burden substantially more speech than necessary." *Id.* And finally, if the Court of Appeals was correct below, *Ward* permits a total ban whenever "a substantial government interest [ ] would be achieved less effectively" without it. A32 (quoting *Ward*, 109 S. Ct. at 2758) (brackets in original).

The formulation adopted by the Court of Appeals in this case would give the government wide latitude in arguing that regulations are narrowly tailored. The federal courts' confusion concerning this basic First Amendment issue plainly calls for this Court's intervention.

CONCLUSION

For the foregoing reasons, petitioners respectfully request the Court to issue a writ of certiorari in this case to review and reverse the decision of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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APPENDIX A

Opinion of the Court of Appeals for the Second Circuit

William B. YOUNG, Jr., and Joseph Walley, on behalf of themselves and all other persons who are similarly situated; and Legal Action Center for the Homeless, Plaintiffs-Appellees,

Sheron Gilmore,

Plaintiff-Intervenor-Appellee,

v.

NEW YORK CITY TRANSIT AUTHORITY, Metropolitan Transportation Authority of the State of New York, Metro-North Commuter Railroad Company, The Long Island Rail Road Company, The Port Authority of New York and New Jersey, and Robert R. Kiley, as Chairman of the New York City Transit Authority, the Metropolitan Transportation Authority of the State of New York, the Metro-North Commuter Railroad Company, and the Long Island Rail Road Company, and Robert Abrams, as Attorney General of the State of New York, Defendants-Appellants,

Philip D. Kaltenbacher, Chairman, Robert F. Wagner, Sr., Vice-Chairman, Hazel Frank Gluck, James G. Hellmuth, Henry F. Henderson, Jr., William K. Hutchison, Richard C. Leone, Basil Patterson, John G. McGoldrick, William J. Ronan, Howard Shulman, and Robert Van Buren, as the Board of Commissioners of the Port Authority of New York and New Jersey, Appellants.

Nos. 1170, 1171 and 1202,

Dockets 90-7115, 90-7137 and 90-7183

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

A2

Opinion of the Court of Appeals for the Second Circuit

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

Argued: March 5, 1990
Decided: May 10, 1990

Before TIMBERS, MESKILL and ALTIMARI, Circuit Judges.

ALTIMARI, Circuit Judge:

The central issue on this appeal is whether the prohibition of begging and panhandling[1] in the New York City subway system violates the First Amendment of the United States Constitution. Defendants-appellants New York City Transit Authority ("TA") and Metropolitan Transportation Authority of the State of New York ("MTA") appeal from a judgment entered in the United States District Court for the Southern District of New York (Leonard B. Sand, *Judge*), permanently enjoining the TA from the enforcement of N.Y.Comp. Codes R. & Regs. tit. 21, § 1050.6 (1989) ("21 N.Y.C.R.R. § 1050.6" and "§ 1050.6"), a regulation prohibiting begging and panhandling in the subway system. They are joined by defendants-appellants Metro-North Commuter Railroad Company ("Metro-North"), Long Island

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[1] The district court accepted the parties' stipulation that any difference in the meaning of the terms is not significant for the purposes of this litigation.

Rail Road Company ("LIRR") and Port Authority of New York and New Jersey ("Port Authority") to the extent that the district court's judgment enjoins the enforcement of the prohibition against begging in their respective transit facilities. In addition, defendants-appellants New York State Attorney General Robert Abrams ("Attorney General") and Port Authority appeal from that portion of the district court's judgment holding New York Penal Law § 240.35(1) (McKinney 1989) ("N.Y. Penal Law § 240.35(1)" and "§ 240.35(1)") to be unconstitutional under the New York State Constitution.

Upon request of the TA and the Port Authority, this Court issued a complete stay pending appeal of the district court's judgment and expedited the appeal on February 7, 1990. On this appeal, as in the district court, the TA argues that begging is not expression protected by the First Amendment, that the subway is not a designated public forum for begging, and that the TA's regulation prohibiting begging is a reasonable time, place, or manner restriction. The Port Authority and the Attorney General argue, *inter alia*, that the plaintiffs failed to allege an actual case or controversy in connection with the New York Penal Law, and they join in the contention that begging is not protected expression under the First Amendment.

The district court concluded that begging constitutes a type of speech that merits the full protection of the First Amendment. Absent an analysis as per *United States* v. *O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968), and an appropriate reading of *Village of Schaumburg* v. *Citizens for a Better Environment*, 444 U.S. 620, 100 S.Ct. 826, 63 L.Ed.2d 73 (1980), hereinafter discussed at some length, we might be inclined to agree.

We do not think, however, that the regulation is directed at speech itself and must be justified by the substantial showing of need that the First Amendment requires. Indeed, the regulation expressly authorizes public speaking and the distribution of written materials. We conclude, therefore, that the regulation is justified by governmental interests that are content neutral and unrelated to the suppression of free expression. Consequently, the regulation comes under the more relaxed level of scrutiny contemplated in *O'Brien* and developed in several recent Supreme Court cases. Pursuant to the *O'Brien* standard, we have no doubt that the regulation comports with the First Amendment.

For the reasons set forth below, we reverse and vacate that part of the district court's judgment enjoining the enforcement of 21 N.Y.C.R.R. § 1050.6 as in contravention of the First Amendment, and we vacate that part of the judgment declaring N.Y. Penal Law § 240.35(1) to be violative of the New York State Constitution.

BACKGROUND

A. The Original Controversy

On November 28, 1989, the Legal Action Center for the Homeless ("LACH") filed suit in the district court on behalf of itself and two homeless men, William B. Young and Joseph Walley, as representative plaintiffs for a class of homeless and needy persons who beg and panhandle in the New York City subway system. The gravamen of the complaint was that the prohibition of begging and panhandling in the subway contravenes the rights to free speech, due process and equal protection of the law. Specifically, the complaint alleged that the enforcement of 21

N.Y.C.R.R. § 1050.6 violated the First and Fourteenth Amendments of the United States Constitution, Article I, §§ 6, 8 and 11 of the New York State Constitution, and 42 U.S.C. §§ 1981 and 1983. Pending the district court's action in declaring the prohibition unconstitutional, the plaintiffs also sought certain preliminary and injunctive relief. Accordingly, they entreated the district court to restrain the defendants from enforcing the prohibition, and to require the defendants to disseminate information throughout the subway system that begging and panhandling are lawful activities.

LACH named the TA, MTA and Metro-North as defendants. Under the direction of the MTA, the TA is empowered to establish regulations governing passenger conduct, in order to facilitate an effective, safe and reliable means of public transportation. N.Y.Pub.Auth.Law § 1201 *et seq.* (McKinney 1982 & Supp.1990). Towards this end, the TA has maintained a longstanding ban on begging and panhandling in the subway system. 21 N.Y.C.R.R. § 1050.6.

In January 1989, the MTA and TA approved the commencement of a rule-making process to amend 21 N.Y.C.R.R. § 1050.6. The existing regulation stipulated that "no person, unless duly authorized . . . shall upon any facility or conveyance . . . solicit alms, subscription or contribution for any purpose." § 1050.6(b). The process, which included four public hearings, did not alter § 1050.6(b), but only added a provision, § 1050.6(c). The amendment permits greater utilization of the transit system for certain non-commercial activities such as: "public speaking; distribution of written materials; solicitation for charitable, religious or political causes; and artistic performances, including the acceptance of donations."

§ 1050.6(c). Pursuant to the amended regulation, these non-transit uses are subject to certain place restrictions. In particular, solicitation for charitable, religious or political causes is prohibited on subway cars, in areas not generally open to the public, within twenty-five feet of a token booth or fifty feet from the entrance to an authority office or tower, § 1050.6(c)(1), in any "location which interferes with access onto or off an escalator, stairway or elevator," § 1050.6(c)(2), and "on a subway platform while construction, renovation or maintenance work is actively underway on or near the platform . . .," § 1050.6(c)(3). The amended regulation, which continues the TA's longstanding ban against begging and panhandling, became effective in October 1989.

At that time, the TA commenced "Operation Enforcement," a program designed to implement more effectively the longstanding prohibition on begging and panhandling in the subway. At the outset of Operation Enforcement, the TA distributed 1,500,000 pamphlets that summarized eleven TA rules, including "No panhandling or begging." The TA rules were also displayed on 15,000 posters throughout the subway system. Both the pamphlets and the posters warned that violation of the TA rules could lead to arrest, fine and/or ejection. Plaintiffs Young and Walley acknowledge in affidavits submitted to the district court that they saw the posters and pamphlets during the information campaign of Operation Enforcement. Although they state their understanding that the TA intends to enforce the rules, they admit that they have continued to beg and panhandle. They further acknowledge that when the police have observed the behavior, rather than arrest them or issue

a summons, the police have requested that they stop the proscribed activity or leave the system.

Before the district court was the following additional evidence. The New York City Subway System transports approximately 3,500,000 passengers on an average workday, operates twenty-four hours a day, seven days a week, and consists of 648 miles of track, 468 subway stations and over 6,000 subway cars. Many parts of the subway system are almost one hundred years old. In a timeworn routine of New York City life, each day a multitude descends the steep and long staircases and mechanical escalators to wait on narrow and crowded platforms bounded by dark tunnels and high power electrical rails.

In 1988, the TA initiated a lengthy study-process concerning "quality of life problems" experienced by riders in their use of the subway system. The study-process disclosed the fact that begging contributes to a public perception that the subway is fraught with hazard and danger. A research survey conducted by Peter Harris revealed that, in fact, two-thirds of the subway ridership have been intimidated into giving money to beggars. The survey also revealed that beggars are perceived to pervade the subway system, and that the ridership considers the presence of beggars as a significant problem.

As another aspect of the study-process, Detective Bernard Jacobs, a twenty-four year veteran of the Transit Authority Police and initiator of the Transit Police Crime Prevention Unit, met with numerous groups of citizens and passengers. He reported that "passengers almost always voice their concern and discomfort about the prevalence of panhandling" in the subway system. The passengers "feel harassed and

intimidated by panhandlers." Moreover, "it is difficult from the police perspective to draw the fine line between panhandling and extortion." Many passengers have complained that demands for money by beggars and panhandlers include "unwanted touching, detaining, impeding and intimidating."

An outside consulting company retained during the study-process confirmed the reality that begging and panhandling in the subway system pose a multi-faceted problem. Professor George Kelling, the president of the consulting company and an expert with extensive national and international experience in social problems, concluded that behavior such as begging generates "high levels of fear in the passengers, thereby discouraging use of the system." In explaining the need for rules against begging in the subway, Kelling drew a distinction between ordinary city streets and the more constrictive New York City subway system. Open city streets allow pedestrians what sociologists term "fate-control," or the ability to avoid and move away from an intimidating person. To the contrary, subway riders enjoy considerably less fluidity of movement and ability to control what happens to them. Whether standing in the crush of riders in a speeding subway car, waiting among the pressing masses on a platform, or swarming with the throng through a maze of mezzanines, staircases and ramps, the rider feels "captive." As a result, Kelling concluded, "[i]n the subway environment, begging is inherently aggressive even if not patently so." In addition, Kelling concluded that begging not only intimidates passengers, but also "has the serious potential of creating an accident and injuring many people." As Kelling observed, the act of placing a cup before persons is often disruptive, startling and potentially dangerous.

During the course of the study-process, TA concerns were not limited to the safety of the ridership and their continued patronage. The Kelling affidavit earmarks research indicating that the homeless in the subways are generally males afflicted with serious mental illness and suffering from alcohol and/or drug abuse. Moreover, the sad statistics reveal that during a ten month period in 1989, an average of six homeless persons per month died in the subway, including fifteen persons who were struck by trains. As a result, Kelling counselled that this "subset of the homeless" should not be encouraged to beg and panhandle in the system "for their own well-being."

B. Proceedings in the District Court

At oral argument on December 1, 1989, LACH elucidated its position. LACH suggested that "whenever a homeless and needy person is extending his hand, he is communicating" and, therefore, the action enjoys full First Amendment protection. Acknowledging as constitutionally valid the place restrictions in the August 1989 amended regulation, LACH challenged as unconstitutional the regulation's distinction between solicitation for charitable, religious or political causes and solicitation of alms by private individuals. On this basis, LACH argued that the total ban on begging and panhandling in the subway system was constitutionally impermissible.

The district court directed attention to several potential ambiguities in the regulation's language. In particular, the district court doubted whether the regulation's "distinction between 'solicit alms' and 'solicit for charitable purposes'" could "survive a . . . challenge for vagueness." The court further called into question the meaning of the phrase

"unless duly authorized by the Authority," and asked whether the TA had "adopted any rules, regulations or standards for the grant or denial of authority." Instructing the TA to brief this issue for the next oral argument, the district court queried "whether this is the regulation that . . . [the TA] want[s] to take to the Supreme Court."

In the interim, the TA promptly responded to the district court's concerns about potential ambiguities in the August 1989 amended regulation. A revised regulation was adopted on December 15, 1989. The revision expressly states: "No person shall panhandle or beg upon any facility or conveyance." § 21 N.Y.C.R.R. § 1050.6(b)(2). Additionally, the revised regulation prohibits all solicitation for charity except by organizations that:

> (1) have been licensed for any public solicitation within the preceding twelve months by the Commissioner of Social Services of the City of New York under § 21-111 of the Administrative Code of the City of New York or any successor provision, or (2) are duly registered as charitable organizations with the Secretary of State of the State of New York under § 172 of the New York Executive Law or any successor provision, or (3) are exempt from federal income tax under § 501(c)(3) of the United States Internal Revenue Code or any successor provision.

21 N.Y.C.R.R. 1050.6(c). With the exception of these clarifications, the 1989 amended regulation remained unchanged.

At a second oral argument on December 18, 1989, the district court granted plaintiffs' motion for an order temporarily restraining the TA from enforcing the

prohibition on begging and panhandling. During the argument, the district court informed the parties that it had, *sua sponte*, written to the New York Attorney General providing him with the opportunity to intervene in the suit. The district court's December 15, 1989 letter alerted the Attorney General of the court's belief that this case "call[s] into question the constitutionality of New York Penal Law Section 240.35." The statute in pertinent part provides that: "[A] person is guilty of loitering when he . . . [l]oiters, remains or wanders about in a public place for the purpose of begging." N.Y. Penal Law § 240.35(1). By a telephone call on the morning of December 18, 1989, the Attorney General's office declined the court's invitation to intervene. The district court then instructed the plaintiffs to file an amended complaint challenging N.Y. Penal Law § 240.35(1) and naming the Attorney General as a defendant in the case.

At this time, the district court also entertained a motion made by the Legal Aid Society to intervene on behalf of Sheron Gilmore. Both the TA and LACH opposed the motion, maintaining that Gilmore was a member of the class represented by Walley and Young and her intervention was not necessary to develop the factual issues in this case. The court, nevertheless, opined that "the case is a very difficult and important case and that there is sufficient work to be done so that the court would welcome the additional resource which the Legal Aid Society can provide." Consequently, the motion was granted. On December 27, 1989, the plaintiffs filed an amended complaint. Complying with the district court's instructions, they named the Attorney General as a defendant and challenged N.Y. Penal Law § 240.35(1). They also added as defendants the LIRR and the Port Authority.

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A third oral argument was conducted on January 22, 1990. Once again, the district court instructed the plaintiffs to amend the complaint. This time the list of defendants was augmented to include all twelve commissioners of the Port Authority rather than solely the Chairman. In addition, the court suggested the plaintiffs redefine the representative class by deleting "homeless" from the description and encompassing "all needy people" who live in New York State. As per the court's directions, the plaintiffs moved to amend the complaint.

Thus, not satisfied with the scope of the original controversy, the district court directed that the complaint be amended on numerous occasions; it *sua sponte* contacted the Attorney General, and when he declined to intervene, directed that he be made a party so that N.Y. Penal Law § 240.35(1) be at issue; it instructed that over a dozen defendants be added, and that the class be enlarged to include all needy persons in New York State.

On January 25, 1990, the district court issued its Opinion and Order. 729 F.Supp. 341. As preliminary matters, the court granted plaintiffs' motions to include the twelve Port Authority commissioners and to certify a class of "all needy persons who live in the State of New York, who are or will be asking or soliciting others for charity for their own benefit in the train, bus or subway stations of New York City or all other places within the jurisdiction of defendants where this is presently prohibited."

Pursuant to the standards for a preliminary injunction, the district court then considered "whether there exist sufficiently serious questions going to the merits of the dispute as to make them fair ground for litigation or whether

plaintiffs have shown a likelihood of success on the merits." The district court first focused its attention on the challenge to the New York Penal Law. Citing to *People* v. *Bright*, 71 N.Y.2d 376, 526 N.Y.S.2d 66, 520 N.E.2d 1355 (1988), the district court held that the state statute violates the due process clause of the New York State Constitution.

When the court turned to the plaintiffs' challenge to 21 N.Y.C.R.R. § 1050.6, its findings were not as clear. First, the court found itself unable to distinguish charitable solicitation and begging on the basis of the "diminished communicative content of begging, the differences between the relative intents of the two types of solicitors, and the historical treatment of begging." In light of the Supreme Court's decision in *Schaumburg*, *supra*, the court concluded that "begging can be protected by the First Amendment."

The court next considered whether the subway system was a traditional or designated public forum. Previously, we held in *Gannett Satellite Information Network, Inc.* v. *Metropolitan Transportation Authority*, 745 F.2d 767, 773 (2d Cir.1984), that the subway is neither a designated nor a traditional public forum. However, the district court proffered that since the holding in *Gannett Satellite* preceded the 1989 amendment of § 1050.6(c), which allows certain non-transit uses of the system, our decision was of "limited precedential value." Citing to *Gannett Satellite*, the district court reasoned that "public property which is neither a traditional nor a designated public forum may still serve as a forum for free expression if that expression is 'appropriate for the property'."

Finally, the district court suggested that the total ban on begging and panhandling is not narrowly tailored to serve a

state interest. Under unchallenged regulations, solicitation is prohibited if conducted in a manner reasonably intended to "annoy[ ], alarm[ ] or inconvenienc[e] others" or which "otherwise tend[s] to create a breach of peace," 21 N.Y.C.R.R. § 1050.6(a); in a manner which "may tend to cause harm or damage to any person," § 1050.7(k); or in a manner that "blocks free movement," § 1050.7(j). These prohibitions, rather than a total ban, constitute reasonable time, place and manner restrictions, according to the district court.

Thus, with regards to the merits of plaintiffs' challenge to 21 N.Y.C.R.R. § 1050.6, the district court concluded that "there are serious questions as to its constitutionality both on its face and as applied to plaintiffs." On the basis of this conclusion, the district court granted a preliminary injunction against defendant TA from enforcement of the regulation.

For similar reasons, the district court granted a preliminary injunction against Port Authority from enforcing a prohibition against begging and panhandling through regulations that authorize a variety of expressive activities by a permit system on a first-come, first-serve basis. *See* N.Y. Comp. Codes R. & Regs. tit. 21, §§ 1220.16, 1221.25 & 1290.3 (1973) ("21 N.Y.C.R.R. §§ 1220.16, 1220.25 & 1290.3"). In addition, the district court held that since the Port Authority approach relied on N.Y. Penal Law § 240.35(1) as a basis for withholding permits to beg, the permit approach violated due process under the New York State Constitution.

In an Order dated February 2, 1990, the district court converted the preliminary injunction against enforcing the prohibition of begging and panhandling to a permanent

injunction. Pending the outcome on appeal to this court, the district court directed that begging and panhandling be permitted on subway platforms and mezzanines except when under construction, repair or maintenance, while at the same time temporarily prohibiting such behavior on subway trains and in the restricted areas where organized charitable solicitation is prohibited under 21 N.Y.C.R.R. § 1050.6(c). On February 7, 1990, we granted a motion of the TA and Port Authority for a stay of the district court's injunction until their appeal was decided. On February 15, 1990, the Attorney General filed a notice of appeal to this Court, challenging the district court's conclusion that N.Y. Penal Law § 240.35(1) violates New York law.

DISCUSSION

A. Speech v. Conduct

On this appeal the plaintiffs contend that "begging is pure speech fully protected by the First Amendment." Recently, the Supreme Court once again admonished against adopting the "'view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea.'" *Texas* v. *Johnson*, — U.S. —, 109 S.Ct. 2533, 2539, 105 L.Ed.2d 342 (1989) (quoting *United States* v. *O'Brien*, 391 U.S. 367, 376, 88 S.Ct. 1673, 1678, 20 L.Ed.2d 672 (1968)). The Court further cautioned that "[t]he Government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word." *Id.*, 109 S.Ct. at 2540. Despite the warning, the plaintiffs nevertheless invoke the First Amendment on the ground that "whenever a homeless and needy person is extending his hand, he is communicating."

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We initiate our discussion by expressing grave doubt as to whether begging and panhandling in the subway are sufficiently imbued with a communicative character to justify constitutional protection. The real issue here is whether begging constitutes the kind of "expressive conduct" protected to some extent by the First Amendment.

Common sense tells us that begging is much more "conduct" than it is "speech." As then Circuit Judge Scalia once remarked: "That this should seem a bold assertion is a commentary upon how far judicial and scholarly discussion of this basic constitutional guarantee has strayed from common and common-sense understanding." *Community for Creative Non-Violence* v. *Watt*, 703 F.2d 586, 622 (D.C.Cir.1983) (rejecting the notion that sleeping in public parks is expressive conduct about the plight of the homeless) (Scalia, J., dissenting), *rev'd sub nom. Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984). Here, what common sense beckons the law ordains.

In determining "whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play," the Supreme Court asks "whether '[a]n intent to convey a *particularized message* was present, and [whether] the *likelihood was great* that the message would be understood by those who viewed it.'" *Spence* v. *Washington*, 418 U.S. 405, 410-11, 94 S.Ct. 2727, 2730, 41 L.Ed.2d 842 (1974) (quoted in *Texas* v. *Johnson*, 109 S.Ct. at 2539) (emphasis added). For example, the Supreme Court has recognized the "expressive nature" in the burning of a United States flag by a protestor during a political march at the Republican National Convention, *Texas* v. *Johnson*, 109 S.Ct. at 2540, in the wearing of black arm-bands by school

students on particular days in protest of the Vietnam War, *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503, 505, 89 S.Ct. 733, 735, 21 L.Ed.2d 731 (1969), in the peaceful picketing by union members of a supermarket in a large shopping center to protest unfair labor practices, *Amalgamated Food Employees Union Local 509* v. *Logan Valley Plaza, Inc.*, 391 U.S. 308, 313-14, 88 S.Ct. 1601, 1605-06, 20 L.Ed.2d 603 (1968), and in conducting a silent sit-in by black persons against a library's segregation policy, *Brown* v. *Louisiana*, 383 U.S. 131, 141-42, 86 S.Ct. 719, 723-24, 15 L.Ed.2d 637 (1966). We note that in all of these cases there was little doubt from the circumstances of the conduct that it formed a clear and particularized political or social message very much understood by those who viewed it. More than one constitutional scholar has commented that in these cases the "expressive behavior is '100% action and 100% expression.'" L. Tribe, *American Constitutional Law* § 12-7, at 827 (2d ed. 1988) (quoting Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 Harv.L.Rev. 1482, 1495-96 (1975)). In other words, the conduct and the expression were inextricably joined.

Pursuant to the criteria articulated in *Spence*, 418 U.S. at 410-11, 94 S.Ct. at 2730, begging is not inseparably intertwined with a "particularized message." It seems fair to say that most individuals who beg are not doing so to convey any social or political message. Rather, they beg to collect money. Arguably, any given beggar may have "[a]n intent to convey a particularized message," *e.g.*: "Government benefits are inadequate;" "I am homeless;" or "There is a living to be made in panhandling." To be sure, the

possibilities are myriad. However, despite the intent of an individual beggar, there hardly seems to be a "great likelihood" that the subway passengers who witness the conduct are able to discern what the particularized message might be.

Even where an individual intends to communicate some particularized message through an act of begging, we wonder whether the conduct is not divested of any expressive element as a result of the special surrounding circumstances involved in this case. In the subway, it is the conduct of begging and panhandling, totally independent of any particularized message, that passengers experience as threatening, harassing and intimidating. Unlike burning a flag, wearing a black arm-band, sitting or marching, begging in the subway is experienced as transgressive conduct whether devoid of or inclusive of an intent to convey a particularized message. *See O'Brien*, 391 U.S. at 382, 88 S.Ct. at 1681 ("The case at bar is therefore unlike one where . . . the communication allegedly integral to the conduct is itself thought to be harmful."). Given the passengers' apprehensive state of mind, it seems rather unlikely that they would be disposed to focus attention on any message, let alone a tacit and particularized one.

The only message that we are able to espy as common to all acts of begging is that beggars want to exact money from those whom they accost. While we acknowledge that passengers generally understand this generic message, we think it falls far outside the scope of protected speech under the First Amendment. We certainly do not consider it as a "means indispensable to the discovery and spread of political truth." *Whitney* v. *California*, 274 U.S. 357, 375, 47 S.Ct. 641, 648, 71 L.Ed. 1095 (1927) (Brandeis, J., joined by

Holmes, J., concurring). Nor do we deem it as communicating one of the "inexpressible emotions" falling "'under the protection of free speech as fully as do Keats' poems or Donne's sermons.'" *Cohen* v. *California*, 403 U.S. 15, 26, 25, 91 S.Ct. 1780, 1788, 29 L.Ed.2d 284 (1971) (quoting *Winters* v. *New York*, 333 U.S. 507, 528, 68 S.Ct. 665, 676, 92 L.Ed. 840 (1948) (Frankfurter, J., dissenting)). Consistent with its prior circumscription of what constitutes protected expressive conduct, the Supreme Court recently declared: "It is possible to find some kernel of expression in almost every activity a person undertakes . . . but such a kernel is not sufficient to bring the activity within the protection of the First Amendment." *City of Dallas* v. *Stanglin*, — U.S. —, 109 S.Ct. 1591, 1595, 104 L.Ed.2d 18 (1989).

The plaintiffs also contend that begging and panhandling on the subway sometimes occasion questions from, and conversations with, passengers. We do not doubt that the proscribed activity may sometimes involve speech and upon occasion even give rise to the exchange of speech. We do not accept, however, that this incidental speech is one and the same as the conduct being regulated. Actual speech which may arise as an incident to conduct is not at issue here. The regulation at stake does not prevent any individual from speaking to passengers. Further, the First Amendment protects speech and not every act that may conceivably occasion engagement in conversation.

Whether with or without words, the object of begging and panhandling is the transfer of money. Speech simply is not inherent to the act; it is not of the essence of the conduct. Although our holding today does not ultimately rest on an ontological distinction between speech and conduct, we think

this case presents a particularly poignant example of how the distinction subsists in right reason and coincides with common sense. To be sure, these qualities ought not to be forsaken in our legal analysis.

B. The "Schaumburg" Trilogy

On this appeal the plaintiffs also argue that there is no meaningful distinction between begging and other types of charitable solicitation. The contention is an echo of the district court's finding that "a meaningful distinction cannot be drawn for First Amendment purposes between solicitations for charity and begging." The district court based its finding on three Supreme Court cases: *Schaumburg, supra; Secretary of State of Maryland* v. *Joseph H. Munson Co., Inc.*, 467 U.S. 947, 104 S.Ct. 2839, 81 L.Ed.2d 786 (1984); and *Riley* v. *National Federation of The Blind of North Carolina, Inc.*, 487 U.S. 781, 108 S.Ct. 2667, 101 L.Ed.2d 669 (1988). In these cases the Supreme Court considered laws regulating solicitations by organized charities, and held that such solicitation constituted a type of speech protected by the First Amendment. At a loss to detect a distinction between such solicitation and begging, the district court reasoned that begging must also enjoy constitutional protection. The district court apparently assumed that the outcome of the three Supreme Court cases would have been the same if, instead of involving door-to-door solicitation by organized charities, they had involved begging and panhandling in the subway. We think that the district court misconstrued the line of reasoning that underpins the trilogy.

The Supreme Court's holding in *Schaumburg* rested on the reasoning that appeals by organized charities "involve a

variety of speech interests" including "communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes." *Schaumburg*, 444 U.S. at 632, 100 S.Ct. at 833. The Court continued that such "solicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues." *Id.* Absent solicitation by organized charities, the Court expressed its concern that "the flow of such information and advocacy would likely cease." *Id.* As a result, the Court concluded that "[c]anvassers in such contexts are necessarily more than solicitors for money" and do "more than inform private economic decisions." *Id.*

Upon revisiting the charitable solicitation field in *Munson*, the Supreme Court quoted all of the above *Schaumburg* language as the basis for concluding that "charitable solicitations are so intertwined with speech that they are entitled to the protections of the First Amendment." *Munson*, 467 U.S. at 959, 104 S.Ct. at 2848. In *Riley*, the Court reiterated that limitations preventing charitable organizations from raising contributions were "unconstitutional under the force of *Schaumburg*." *Riley*, 108 S.Ct. at 2673.

The facts in *Munson* demonstrate the significance of the nexus between solicitation and traditional First Amendment activities. Munson was a professional fundraiser who challenged a Maryland statute that prohibited charitable organizations from paying any more than twenty-five percent of the amount raised by fund-raising activity to such professional fund-raisers. The Supreme Court struck down the statute on the ground that "charities often . . . combin[e] solicitation with dissemination of information, discussion, and advocacy of public issues, an activity clearly protected

by the First Amendment," and not upon the fundraiser's right to retain the funds he solicited on behalf of the charity. *Munson*, 467 U.S. at 961, 104 S.Ct. at 2849. *See also Cornelius* v. *NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 799, 105 S.Ct. 3439, 3447, 87 L.Ed.2d 567 (1985) ("the nexus between solicitation and the communication of information and advocacy of causes. . . . implicates interests protected by the First Amendment"); *cf. Ohralik* v. *Ohio State Bar Ass'n.*, 436 U.S. 447, 457-58, 98 S.Ct. 1912, 1919-20, 56 L.Ed.2d 444 (1978) (lawyer's unsolicited legal advice did not implicate First Amendment since "it actually may disserve the individual and societal interest . . . in facilitating 'informed and reliable decisionmaking'") (citation and footnote omitted). Thus, neither *Schaumburg* nor its progeny stand for the proposition that begging and panhandling are protected speech under the First Amendment. Rather, these cases hold that there is a sufficient nexus between solicitation by organized charities and a "variety of speech interests" to invoke protection under the First Amendment.

Consistent with the *Schaumburg* reasoning, the TA amended 21 N.Y.C.R.R. § 1050.6 to allow for solicitation by organized charities in certain areas of the subway system, while totally prohibiting begging and panhandling. Despite the district court's inability to draw a distinction between begging and solicitation by organized charities, the amended regulation reflects the TA's ability to do so. Before the district court was evidence that subway passengers experience begging as intimidating, harassing and threatening. Moreover, the passengers perceive that beggars and panhandlers pervade the system. Indeed, such conduct has been reported in virtually every part of the system.

Nowhere in the record is there any indication that passengers felt intimidated by organized charities. In amending the regulation based on its experience, the TA drew a distinction between the harmful effects caused by individual begging and the First Amendment interests associated with solicitation by organized charities. Further, the TA obviously made a judgment that while solicitation by organized charities could be contained to certain areas of the system, the problems posed by begging and panhandling could be addressed by nothing less than the enforcement of a total ban. We think that the amendment of the regulation reflects the TA's concerns to respect the First Amendment in accordance with *Schaumburg* and at the same time to protect its patrons from being accosted. We find no reason to quarrel with these legitimate concerns.

Both the reasoning of *Schaumburg* and the experience of the TA point to the difference between begging and solicitation by organized charities. In the instant case, the difference must be examined not from the imaginary heights of Mount Olympus but from the very real context of the New York City subway. While organized charities serve community interests by enhancing communication and disseminating ideas, the conduct of begging and panhandling in the subway amounts to nothing less than a menace to the common good. *See Members of the City Council of the City of Los Angeles* v. *Taxpayers for Vincent*, 466 U.S. 789, 805, 104 S.Ct. 2118, 2128, 80 L.Ed.2d 772 (1984) (The government may "protect its citizens from unwanted exposure to certain methods of expression which may legitimately be deemed a public nuisance."). The lone dissent in *Schaumburg* recognized this difference stating: "[N]othing in the United States Constitution should

prevent residents of a community from making the collective judgment that certain worthy charities may solicit . . . while at the same time insulating themselves against panhandlers, profiteers, and peddlers." *Schaumburg*, 444 U.S. at 644, 100 S.Ct. at 840 (Rehnquist, J., dissenting).

The district court attempted to discredit this difference by suggesting that historically begging has not been considered a *malum in se*. Similarly, the plaintiffs warn that the prohibition of begging is "a stark departure . . . from our Judeo-Christian tradition." We are not unaware that the giving of alms has long been considered virtuous in our Western tradition. In antiquity the humanist and jurist, Cicero, said of Caesar: "Of all thy virtues none is more marvelous and graceful than charity." Some centuries later the Christian thinker, Augustine of Hippo, observed that it is essential to the virtue that "charity obeys reason, so that charity is vouchsafed in such a way that justice is safeguarded, when we give to the needy." In Medieval times the Jewish philosopher, Moses Maimonides, espoused a charity such that "no contribution should be made without the donor feeling confident that the administration is honest, prudent and capable of management." The district court itself stated that "[i]n early English common law, begging by those able to work was prohibited, but beggars who were unable to work were licensed and restricted to specific areas." Thus, while there can be no doubt that giving alms is virtuous, in the Western tradition there is also no doubt that the virtue is best served when it reflects an "ordered charity." It does not seem to us that the TA's regulation of solicitation and ban on begging are inconsistent with the concept. Although this discussion is certainly not determinative of the legal issues now before us, we mention

it here only because both the plaintiffs and the district court have attributed a fair amount of weight to it. We take this opportunity, therefore, to suggest that it is not the role of this court to resolve all the problems of the homeless, as sympathetic as we may be. We must fulfill the more modest task of determining whether the TA may properly ban conduct that it finds to be inherently harmful in the subway system.

C. The O'Brien Standard

Assuming *arguendo* that begging and panhandling possess some degree of a communicative nature, we next inquire whether the district court correctly determined the enforcement of 21 N.Y.C.R.R. § 1050.6 to be violative of the First Amendment. The threshold question here is what level of judicial scrutiny to apply in evaluating the regulation. Government regulation of expressive conduct may abridge speech in either of two ways. *See generally* L. Tribe, *American Constitutional Law* § 12-2 (2d ed. 1988) (appropriately enough characterizing the levels of scrutiny as "track one" and "track two"). "'A law *directed at* the communicative nature of conduct must, like a law directed at speech itself, be justified by the substantial showing of need that the First Amendment requires.'" *Texas* v. *Johnson*, 109 S.Ct. at 2540 (emphasis in original) (quoting *Community for Creative Non-Violence* v. *Watt*, 703 F.2d at 622-23 (Scalia, J., dissenting)). Alternatively, a regulation may proscribe particular conduct in order to protect a "'governmental interest . . . unrelated to the suppression of free expression.'" *Id.* (quoting *O'Brien*, 391 U.S. at 377, 88 S.Ct. at 1679). In the latter case, the regulation comes under the "relatively lenient" level of judicial scrutiny represented

by the *O'Brien* standard. *Id.* (citing *O'Brien*, 391 U.S. at 377, 88 S.Ct. at 1679). "It is, in short, not simply the verbal or nonverbal nature of the expression, but the governmental interest at stake, that helps to determine whether a restriction on that expression is valid." *Id.*

Pursuant to *O'Brien*, "a government regulation is sufficiently justified" when: (1) "it is within the constitutional power of the Government;" (2) "it furthers an important or substantial governmental interest;" (3) "the governmental interest is unrelated to the suppression of free expression;" and (4) "the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *O'Brien*, 391 U.S. at 377, 88 S.Ct. at 1679. *See also City Council of Los Angeles* v. *Taxpayers For Vincent*, 466 U.S. at 805, 104 S.Ct. at 2128. In its application of *O'Brien*, the Supreme Court has "highlighted" the importance of the third requirement, and seems to have adapted it as a threshold inquiry, the answer to which determines on which track to proceed. *See Texas* v. *Johnson*, 109 S.Ct. at 2541. Once the third requirement has been satisfied, the Supreme Court has indicated that the *O'Brien* standard "'in the last analysis is little, if any, different from the standard applied to time, place or manner restrictions.'" *Id.* at 2540 (quoting *Clark*, 468 U.S. at 298, 104 S.Ct. at 3071). *See also FW/PBS, Inc.* v. *City of Dallas* (Paris Adult Bookstores II), — U.S. —, 110 S.Ct. 596, 614, 107 L.Ed.2d 603 (1990) (White, J., joined by Rehnquist, C.J., concurring) ("Time, place, and manner restrictions are not subject to strict scrutiny and are sustainable if they are content neutral, designed to serve a substantial governmental interest, and do not unreasonably limit alternative means of communication.").

In the present case, there is no indication that the district court ever inquired as to which level of judicial scrutiny is appropriate. Instead, the district court seemed to presume that the conduct at issue deserved full First Amendment protection. We think the omission and presumption were fatal to the district court's reasoning, since the regulation at issue runs squarely onto track two, under the relaxed *O'Brien* standard. Generally speaking, this more lenient level of judicial scrutiny requires us to weigh the extent to which expression is in fact inhibited against the governmental interest in proscribing particular conduct. *See* L. Tribe, *American Constitutional Law* § 12-23, at 979 (2d ed. 1988) ("To be weighed in the balance are, on the one hand, the extent to which communicative activity is in fact inhibited; and, on the other hand, the values, interests, or rights served by enforcing the inhibition."). Here, on balance, the governmental interests must prevail.

The first *O'Brien* requirement is not genuinely at issue. Although the plaintiffs asserted in the original complaint that § 1050.6 was outside the rule-making authority conferred on the TA, their claim is entirely passed over in the district court's Opinion and Order. The TA, in fact, has a broad statutory mandate to promulgate rules "governing the conduct and safety of the public as it may deem necessary, convenient or desirable, . . . including without limitation rules relating to the protection or maintenance of such facilities [and] the conduct and safety of the public." N.Y.Pub.Auth.Law § 1204.

Second, the regulation advances substantial governmental interests. A majority of the subway's over three million daily passengers perceive begging and panhandling to be "intimidating", "threatening", and "harassing". The conduct

often involves "unwanted touching [and] detaining" of passengers. The police have great difficulty distinguishing between "panhandling and extortion". Begging is "inherently aggressive" to the "captive" passengers in the close confines of the subway atmosphere. Based on these facts, it is fair to say that whether intended as so, or not, begging in the subway often amounts to nothing less than assault, creating in the passengers the apprehension of imminent danger. Additionally, begging in the subway raises legitimate concerns about public safety. The conduct "disrupts" and "startles" passengers, thus creating the potential for a serious accident in the fast-moving and crowded subway environment. In short, the TA's judgment that begging is alarmingly harmful conduct that simply cannot be accommodated in the subway system is not unreasonable.

The governmental interests in the prohibition of begging in the subway are more fully elucidated when the harms to be avoided are juxtaposed with the good to be sustained. The subway is not a domain of the privileged and powerful. Rather, it is the primary means of transportation for literally millions of people of modest means, including hard-working men and women, students and elderly pensioners who live in and around New York City and who are dependent on the subway for the conduct of their daily affairs. They are the bulk of the subway's patronage, and the City has an obvious interest in providing them with a reasonably safe, propitious and benign means of public transportation. In determining the validity of the ban, we must be attentive lest a rigid, mechanistic application of some legal doctrine gainsays the common good. In our estimation, the regulation at issue here is justified by legitimate, indeed compelling, governmental interests. We think that the district court's analysis reflects

an exacerbated deference to the alleged individual rights of beggars and panhandlers to the great detriment of the common good.

Third, the regulation relies on governmental interests unrelated to the suppression of free expression. As previously noted, the Supreme Court has "highlighted" the significance of this third *O'Brien* factor. *Texas* v. *Johnson*, 109 S.Ct. at 2540-41. The requirement that the governmental interest at stake be unrelated to the suppression of free expression seems equivalent to the "content neutrality" requirement. *See Ward* v. *Rock Against Racism*, — U.S. —, 109 S.Ct. 2746, 2754, 105 L.Ed.2d 661 (1989) ("A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others."); *Clark* v. *Community for Creative Non-Violence*, 468 U.S. at 295, 104 S.Ct. at 3070 (The regulation "is content-neutral and is not being applied because of disagreement with the message presented."). In *Ward* v. *Rock Against Racism*, the Court stated: "The principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." 109 S.Ct. at 2754. Facially, § 1050.6, of course, has nothing to do with a restriction on expression. In determining whether the governmental interest is content neutral and unrelated to the suppression of free expression, the real question must be whether the dangers relied on as justification for the regulation arise at least in some measure from the alleged communicative content of the conduct.

For example, in striking down a Texas statute that rendered desecration of the flag unlawful, the Supreme Court noted the statute was directly "aimed at protecting onlookers

from being offended by the ideas expressed by the prohibited activity." *Texas* v. *Johnson*, 109 S.Ct. at 2543, n. 7. Similarly, in *Cohen* v. *California*, 403 U.S. 15, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971), the Court reversed the conviction of a defendant under a California penal statute for offensive conduct as a result of wearing a jacket into a courthouse on which were visible the words "F__k the Draft". The Court reasoned this "vulgar allusion" and "unseemly expletive" was protected since "[t]he only 'conduct' which the State sought to punish . . . [was] the fact of communication." *Id.* at 18, 20, 23, 91 S.Ct. at 1784, 1785, 1787.

In contrast to *Texas* v. *Johnson* and *Cohen*, the governmental interests in *O'Brien* concerned the preservation of the selective service system which would have been equally threatened if the conduct of burning a draft card was totally bereft of a communicative character. If, for example, O'Brien had destroyed the card in private with no witnesses, the governmental interest in prohibiting the destructive conduct in order to protect the smooth and proper functioning of the selective service system would have been unchanged. *O'Brien*, 391 U.S. at 375, 88 S.Ct. at 1678. As the Supreme Court explained, *O'Brien's* conduct "willfully frustrated" the governmental interest, and consequently, he was convicted "[f]or this noncommunicative impact of his conduct, and for nothing else." *Id.* at 382, 88 S.Ct. at 1682. The Court pointed out: "The case at bar is therefore unlike one where the alleged governmental interest in regulating conduct arises in some measure because the communication allegedly integral to the conduct is itself thought to be harmful." *Id.*

Like *O'Brien*, the case now at bar involves proscription of conduct for reasons completely unrelated to the alleged communicative impact of the conduct. There is nothing in the record to suggest even remotely that the TA's interests in stopping begging arise because the TA objects to a particularized idea or message. To the contrary, the TA regulation is simply not directed at any expressive aspect of the proscribed conduct. In fact, under the amended TA rules, the message may be expressly delivered. Quite apart from any particularized idea or message it might arguably possess, begging poses significant dangers to the subway system. The conduct threatens passenger well-being and safety as well as disrupts the system's smooth operation. These dangers, independent of the alleged communicative character of begging, give rise to the regulation. Even if begging had no communicative character at all, these independent dangers would be just as real, and consequently, there would remain a substantial governmental interest in prohibiting the conduct in the subway. It seems evident to us that the regulation is content neutral, and is justified on the ground that it serves legitimate governmental interests totally unrelated to the suppression of free expression.

Finally, the exigencies created by begging and panhandling in the subway warrant the conduct's complete prohibition. It is now well-settled that regulations restricting the time, place or manner of expressive conduct do not violate the First Amendment "simply because there is some imaginable alternative that might be less burdensome on speech." *United States* v. *Albertini*, 472 U.S. 675, 689, 105 S.Ct. 2897, 2906, 86 L.Ed.2d 536 (1985). Commenting on the fourth *O'Brien* factor, the Supreme Court made this point painstakingly clear:

> Lest any confusion on the point remain, we reaffirm today that a regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government's legitimate content-neutral interests but that it need not be the least-restrictive or least-intrusive means of doing so. Rather, the requirement of narrow tailoring is satisfied "*so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.*"

Ward v. *Rock Against Racism*, 109 S.Ct. at 2757-58 (emphasis added) (quoting *Albertini*, 472 U.S. at 689, 105 S.Ct. at 2906) (footnote omitted) (ellipses in original).

The Supreme Court's clear statement notwithstanding, the district court reasoned that the prohibition was not a reasonable time, manner or place restriction because "different TA regulations . . . already prohibit conduct which has 'the reasonably intended effect of annoying, alarming or inconveniencing others, or otherwise tend[s] to create a breach of peace,' [citation omitted], which 'interferes with the provision of transit service or obstruct[s] the flow of traffic on facilities or conveniences,' [citation omitted], or which 'causes or may tend to cause harm or damage to any person. . . .'" In other words, the district court concluded that the regulation prohibiting begging was invalid since the TA already had at its disposal a less restrictive alternative. Such reasoning flies directly in the face of the tenet quoted above that the narrow tailoring requirement is met when "a substantial government interest [ ] would be achieved less effectively" absent the regulation. A "regulation will not be invalid simply because a court concludes that the government's interest could be adequately

served by some less-speech-restrictive alternative." *Ward* v. *Rock Against Racism*, 109 S.Ct. at 2758.

The district court further reasoned that since the TA regulation allows some solicitation by organized charities in certain areas of the subway system, the TA must permit individual beggars and panhandlers to do the same. According to the Kelling affidavit, TA experience demonstrates that "panhandling leads both to more panhandling and to more aggressive panhandling in the transit system." Indeed, "aggressive" and "intimidating" begging and panhandling have been observed in virtually every part of the subway system, in subway cars and on platforms, escalators, steps and walkways. Based on its experience, the TA obviously reached a judgment that the only effective way to stop begging in the system was through the enforcement of a total ban. The TA's judgment is consistent with the Supreme Court's rule that the "narrow tailoring" requirement is satisfied "so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." *Ward* v. *Rock Against Racism*, 109 S.Ct. at 2759; *see N.Y. City Unemployed & Welfare Council* v. *Brezenoff*, 742 F.2d 718, 721 (2d Cir.1984) ("A blanket prohibition of a particular type of speech in a public forum may sometimes be a reasonable time, place or manner restriction.").

In addition, the regulation at issue "leave[s] open ample alternative channels of communication." *Ward* v. *Rock Against Racism*, 109 S.Ct. at 2760. Under the regulation, begging is prohibited only in the subway, not throughout all of New York City. It is untenable to suggest, as do the plaintiffs, that absent the opportunity to beg and panhandle in the subway system, they are left with no means to

communicate to the public about needy persons. Previously, the Supreme Court rejected a similar claim that a government ban on overnight sleeping in Lafayette Park, in Washington, D.C., impermissibly limited the means of communicating a message about the plight of the homeless. *Clark* v. *Community for Creative Non-Violence*, 468 U.S. at 295, 104 S.Ct. at 3070. As the Court noted: "Respondents do not suggest that there was, or is, any barrier to delivering to the media, or to the public by other means, the intended message concerning the plight of the homeless." *Id.*; *see also City of Renton* v. *Playtime Theatres, Inc.*, 475 U.S. 41, 54, 106 S.Ct. 925, 932, 89 L.Ed.2d 29 (1986) (upholding a city ordinance that prohibited adult movie theaters within 1,000 feet of any residential zone, family dwelling, church, park or school since it left 520 acres or about five percent of the city land available for such theaters). While emphasizing the total prohibition of begging in the subway, the district court failed to address the fact that there has been no showing in this case that the remaining avenues of communication are inadequate.

Essentially, the district court saw fit to substitute its judgment for the TA's experience and expertise in operating the subway system. In so doing, the district court contravened the fundamental principle of the judicial deference owed to officials in carrying out their responsibilities based on expertise and experience. Respecting this principle, the Supreme Court, in *Clark* v. *Community for Creative Non-Violence*, 468 U.S. at 299, 104 S.Ct. at 3072, concluded:

> We do not believe, however, that either *United States* v. *O'Brien* or the time, place, or manner decisions assign to the judiciary the authority to replace the Park Service as

> the manager of the Nation's parks or endow the judiciary with the competence to judge how much protection of park lands is wise and how that level of conservation is to be attained.

To paraphrase the High Court, we can only conclude in the instant case that the district court improperly decided to replace the TA as manager of the subway system and falsely assumed the competence to judge how much protection of the system and its passengers is wise and how that level of safe public transportation is to be attained.

In sum, even if begging and panhandling constitute protected expressive conduct, which is in serious doubt, we hold that the regulation at issue more than satisfies the *O'Brien* standard, and thus is not in violation of the First Amendment.

D. Public Forum Analysis

Although it is not necessary to our holding in this case, we briefly turn our attention to the district court's conclusion that the subway is a public forum in which begging and panhandling must be permitted. Since the amended 21 N.Y.C.R.R. § 1050.6 permits organizations to solicit, the district court reasoned that the TA "tacitly acknowledges that solicitation of money [by beggars and panhandlers] is appropriate in segments of the transit system." Based on this reasoning, the district court discounted our holding in *Gannett Satellite*, 745 F.2d at 773, that the subway is not a traditional or designated public forum, and concluded that any area of the subway system where charitable solicitation is permitted, including platforms and mezzanines, is therefore a public forum where begging and panhandling must be permitted. However, it is clear that "[t]he

government does not create a public forum . . . by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse." *Cornelius* v. *NAACP Legal Defense & Educational Fund*, 473 U.S. at 802, 105 S.Ct. at 3449.

The district court's conclusion misapprehends the TA's intent in revising the regulation. As the Supreme Court has explained: "We will not find that a public forum has been created in the face of clear evidence of a contrary intent, . . . nor will we infer that the government intended to create a public forum when the nature of the property is inconsistent with expressive activity." *Id.* at 803, 105 S.Ct. at 3449. Moreover, "[i]n cases where the principal function of the property would be disrupted by expressive activity, the Court is particularly reluctant to hold that the government intended to designate a public forum." *Id.* at 804, 105 S.Ct. at 3450. In the face of Operation Enforcement, there can be no doubt that the TA intended to continue its long-standing prohibition of begging and panhandling even after revising the regulation to permit solicitation by organizations.

Further, it is permissible for the TA to limit solicitation in the subway system to organizations. "[A] public forum may be created by government designation of a place or channel of communication for use by the public at large for assembly and speech, *for use by certain speakers, or for the discussion of certain subjects*. *Id.* at 802, 105 S.Ct. at 3449 (emphasis added); *see Perry Education Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 46 n. 7, 103 S.Ct. 948, 955 n. 7, 74 L.Ed.2d 794 (1983) (A designated public forum "may be created for a limited purpose such as use by certain groups."); *Calash* v. *City of Bridgeport*, 788 F.2d 80, 84

(2d Cir.1986) ("[A] public forum can be created for use only by certain speakers or for discussion of certain topics."); *Deeper Life Christian Fellowship, Inc.* v. *Board of Education*, 852 F.2d 676, 680 (2d Cir.1988) (same).

Thus, the TA never intended to designate sections of the subway system, including platforms and mezzanines, as a place for begging and panhandling. Nor does the amended regulation abrogate our holding in *Gannett Satellite* that the subway system is not a traditional or designated public forum. The amended regulation demonstrates the TA's concern to safeguard the system and to honor the First Amendment. Confronted with the district court's holding, a cynic might remind the TA that "no good deed goes unpunished."

E. N.Y. Penal Law § 240.35(1)

We now turn our attention to the district court's conclusion that N.Y. Penal Law § 240.35(1) violates the due process clause of the New York State Constitution. The district court reached the conclusion solely on the basis of its interpretation of several New York State cases, relying in particular on a recent opinion of the New York Court of Appeals, *People* v. *Bright, supra*. Our primary concern is whether consideration of this issue was properly within the district court's jurisdiction. The question of whether the court properly exercised jurisdiction may be raised by this Court, itself, at any stage of the proceedings. *Manway Construction Co.* v. *Housing Authority of Hartford*, 711 F.2d 501, 503 (2d Cir.1983).

First, we are doubtful that plaintiffs have alleged an actual "case or controversy," as required by Article III of the United States Constitution. *See City of Los Angeles* v. *Lyons*,

461 U.S. 95, 101, 103 S.Ct. 1660, 1664, 75 L.Ed.2d 675 (1983); *Babbitt* v. *United Farm Workers Nat. Union*, 442 U.S. 289, 297-98, 99 S.Ct. 2301, 2308-09, 60 L.Ed.2d 895 (1979). To satisfy this constitutionally-mandated jurisdictional requirement,

> [p]laintiffs must demonstrate a "personal stake in the outcome" in order to "assure that concrete adverseness which sharpens the presentation of issues" necessary for the proper resolution of constitutional questions. . . . Abstract injury is not enough. The plaintiff must show that he "has sustained or is immediately in danger of sustaining some direct injury" as the result of the challenged official conduct and the injury or threat of injury must be both "real and immediate," not "conjectural" or "hypothetical."

Lyons, 461 U.S. at 101-02, 103 S.Ct. at 1664-65 (citations omitted). As it relates to the issue of whether § 240.35(1) comports with the New York State Constitution, we do not think that this fundamental prerequisite of jurisdiction has been satisfied.

Initially, the New York Penal Law was simply not at issue in this case. In the original complaint, the plaintiffs alleged violations of their rights as a result of the TA's enforcement of 21 N.Y.C.R.R. § 1050.6(b) in the subway system. They never maintained that any of the defendants, in fact, stopped them from begging and panhandling pursuant to the N.Y. Penal Law § 240.35(1). By instructing the plaintiffs to challenge § 240.35(1), the district court designed a much different case than the controversy that originally came before the court. From the outset, the role of Metro-North, an original defendant in the case, had been dubious since the

commuter railroad was not empowered to enforce the TA ban on begging and panhandling pursuant to § 1050.6. The challenge to § 240.35(1) enabled the district court to exercise jurisdiction over Metro-North, as well as the LIRR, the Port Authority and conceivably any other defendant empowered to enforce this provision of the New York Penal Law. At a minimum, the scope of the case was expanded beyond the subway to include facilities such as Grand Central Station, Pennsylvania Station, the Port Authority Bus Terminal and the World Trade Center.

In its Opinion and Order dated January 25, 1990, the district court indicated that its *sua sponte* "action was prompted by defendants' assertion that transit police, as duly authorized peace officers, were doing no more than enforcing that provision [§ 240.35(1)] of the state penal law." The court was apparently referring to a statement made by the TA in a memorandum filed November 30, 1989 submitted in opposition to the motion for a preliminary injunction. The memorandum observed that the TA regulation at issue was "comparable to a New York State Penal provision prohibiting loitering, remaining or wandering about in a public place 'for the purpose of begging' N.Y. Penal Law § 240.35." Based on this observation, the district court raised and discussed the issue at length during the first oral argument, subsequently attempted to join the Attorney General so as to call the state statute into question, and finally, at the second oral argument, instructed the plaintiffs to amend the complaint accordingly.

Subject matter jurisdiction may not be created either by the parties, or by the court. The record is devoid of any allegation that the plaintiffs have been prohibited from

begging or panhandling on the basis of § 240.35(1). The TA prohibition of begging is based on its own regulations, not on the New York Penal Law. The Port Authority represented during this litigation that, on the basis of § 240.35(1), it would not issue a permit to beg pursuant to 21 N.Y.C.R.R. §§ 1220.16, 1220.25 and 1290.3. However, the plaintiffs have never requested, nor have they been denied, a permit to beg by the Port Authority. Indeed, while plaintiffs admit to begging in the Port Authority facilities, they do not allege that they have ever been requested to desist or to leave by any Port Authority official. Nor do the plaintiffs suggest that anyone has ever been arrested or prosecuted for begging or panhandling in the Port Authority pursuant to § 240.35(1). At most, the plaintiffs have alleged an "abstract" and "hypothetical," rather than a "real and immediate," possibility of injury. *Lyons*, 461 U.S. at 101-02. When one cuts through the procedural labyrinth of this case, it becomes clear that the district court, and not the plaintiffs, raised the New York Penal Law as an issue. As we have noted previously, "[p]rocedural irregularities almost always breed confusion, the great enemy of justice." *United States* v. *Town of North Hempstead*, 610 F.2d 1025, 1031 (2d Cir.1979).

Based on the plaintiffs' failure to apply to the Port Authority for a permit to beg prior to challenging its reliance on § 240.35(1), we must conclude that they have failed to allege either a direct injury or an imminent danger of injury resulting from the challenged provision of the New York Penal Law. *See Berrigan* v. *Norton*, 451 F.2d 790 (2d Cir.1971) (Where two prisoners failed to request, and the warden never denied, permission to engage in First Amendment activity outside the prison, the court lacked

jurisdiction to consider the prisoners' claims of constitutional violations as they did not present a justiciable case or controversy.). Accordingly, this aspect of their complaint must be dismissed.

Even if the plaintiffs had alleged a justiciable case or controversy, the district court would have lacked subject matter jurisdiction over this issue. The jurisdiction of the district courts is limited not only by the Constitution, but also by Congress. *See Town of North Hempstead*, 610 F.2d at 1029. It seems clear that the district court properly exercised its jurisdiction over plaintiffs' First Amendment claims pursuant to 28 U.S.C. § 1331. However, the constitutionality under the New York State Constitution of a New York Penal Law provision presents no federal questions. Consequently, the district court's adjudication of this issue would only be permissible if the issue properly fell within the court's pendent jurisdiction. *See Carnegie-Mellon University* v. *Cohill*, 484 U.S. 343, 108 S.Ct. 614, 618, 98 L.Ed.2d 720 (1988); *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 725, 86 S.Ct. 1130, 1138, 16 L.Ed.2d 218 (1966); *Town of North Hempstead*, 610 F.2d at 1029.

An exercise of pendent jurisdiction is appropriate when "the federal and state claims are sufficiently related so as to be considered to 'comprise but one constitutional "case"', the test of relatedness being whether the claims 'derive from a common nucleus of operative fact.'" *Town of North Hempstead*, 610 F.2d at 1030 (citation omitted). Although the doctrine of pendent jurisdiction is one of flexibility and discretion, it is fundamental that "[n]eedless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law." *Gibbs*, 383

U.S. at 726, 86 S.Ct. at 1139 (footnote omitted). A district court ought not "reach out for . . . issues, thereby depriving state courts of opportunities to develop and apply state law." *Mayer* v. *Oil Field Systems Corp.*, 803 F.2d 749, 757 (2d Cir.1986). These same principles underlie our 11th Amendment jurisprudence:

> A federal court's grant of relief against state officials on the basis of state law . . . does not vindicate the supreme authority of federal law. On the contrary, it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law. Such a result conflicts directly with the principles of federalism . . . .

Pennhurst State School & Hospital v. *Halderman*, 465 U.S. 89, 106, 104 S.Ct. 900, 911, 79 L.Ed.2d 67 (1984). Thus, pendent jurisdiction should not be exercised merely because "the exercise of such judicial power is desirable or expedient." *Town of North Hempstead*, 610 F.2d at 1029.

Applying these principles to the case at bar, we fail to see a sufficient relationship between the First Amendment challenge to the TA's prohibition against begging and the challenge, based on the due process clause of the New York State Constitution, to N.Y. Penal Law § 240.35(1). The federal constitutional claim raises legal issues completely unrelated to those presented by the state constitutional claim. The fact that the TA's prohibition on begging is unconnected to the New York Penal Law deprives the claims of the requisite "common nucleus of operative fact" for the exercise of pendent jurisdiction. *See Gibbs*, 383 U.S. at 725, 86 S.Ct. at 1138; *Town of North Hempstead*, 610 F.2d at 1029-30. Moreover, exercising pendent jurisdiction in this

case would violate fundamental principles of federalism and comity. New York State has a definite interest in determining whether its own laws comport with the New York Constitution. A proper determination may well involve ascertaining the state legislature's intention in passing § 240.35(1), as well as interpreting prior decisions of the New York courts. We think the federal district court was ill-disposed to undertake such a task.

CONCLUSION

We hold that 21 N.Y.C.R.R. § 1050.6 does not violate the First Amendment, and consequently, we reverse and vacate the district court's judgment permanently enjoining the various defendants from enforcing a prohibition against begging in their respective public transit facilities. In addition, we vacate the district court's judgment declaring that N.Y. Penal Law § 240.35(1) violates the New York State Constitution.

MESKILL, Circuit Judge, concurring in part and dissenting in part:

I concur with the majority opinion insofar as it vacates the district court's invalidation of N.Y. Penal L. § 240.35(1) (McKinney 1989). With respect to the First Amendment issues, however, the difficult question for me is whether any legally justifiable distinction can be drawn between begging for one's self and solicitation by organized charities. I am unable to do so, and therefore I respectfully dissent from the Court's disposition of these claims. According to the majority, common sense tells us that begging enjoys no First Amendment protection because it is conduct unassociated with any particularized message and because begging, unlike

"charitable solicitation," is mere solicitation for money with a diminished communicative content. I agree that common sense and everyday experience should inform our decision. Their true teaching, however, is that both beggars and organized charities who send representatives into the subway have one primary goal: in the words of the majority, "the transfer of money." Nevertheless, in *Village of Schaumburg* v. *Citizens for a Better Environment*, 444 U.S. 620, 100 S.Ct. 826, 63 L.Ed.2d 73 (1980), the Supreme Court saw fit to extend First Amendment protection to the fundraising efforts of organized charities. In my opinion, beggars deserve that same protection.

In *Schaumburg*, the Court held that charitable solicitation is protected because it "is characteristically intertwined with . . . speech seeking support for particular causes or for particular views on economic, political, or social issues." 444 U.S. at 632, 100 S.Ct. at 834. Notably, the Court did not suggest that charitable solicitation is protected expression because it is always accompanied by speech on social issues. If that were the test, then it is doubtful that any organized charity soliciting contributions in the New York subway would be engaged in protected expression. Those charities receive countless donations without engaging in any discussion whatsoever with the typical donor rushing to catch a train. Rather, the *Schaumburg* Court held that First Amendment protection attaches to all charitable solicitation, whether or not any speech incident to the solicitation actually takes place, because a sufficient nexus exists between a charity's expression of ideas and its fundraising. That is, a charity's representatives often explain the purpose of the charity's work to potential donors and perhaps engage in a discussion regarding social issues. In addition, the receipt of

donations is essential to the continued existence of a charity. The record in the present case, as well as the common experience of those who ride the New York subways, indicates that begging is protected expression for exactly the same reasons.

Plaintiffs Young, Walley and Gilmore all state in their affidavits that they often speak with potential donors about subjects such as the problems of the homeless and poor, the perceived inefficiency of the social service system in New York and the dangerous nature of the public shelters in which they sometimes sleep. The speech and association inherent in these encounters is without doubt protected by the First Amendment. *See, e.g., Connick* v. *Myers*, 461 U.S. 138, 145, 103 S.Ct. 1684, 1689, 75 L.Ed.2d 708 (1983). Similarly, a beggar who holds a sign saying "Help the Homeless" or "I am hungry" is engaged in First Amendment activity. *See Cohen* v. *California*, 403 U.S. 15, 18-19, 91 S.Ct. 1780, 1784-85, 29 L.Ed.2d 284 (1971) (person wearing jacket with anti-war slogan engaged in protected expression of views). Any attempt to distinguish between beggars who hold signs or engage in discussions and those who simply ask for money would be unrealistic. Accordingly, if First Amendment protection extends to charitable solicitation unaccompanied by speech, as it apparently does, it must extend to begging as well. *See Riley* v. *National Federation of the Blind, Inc.*, 487 U.S. 781, 108 S.Ct. 2667, 2677, 101 L.Ed.2d 669 (1988) (*Schaumburg* "refused to separate the component parts of charitable solicitations from the fully protected whole"); *see also Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 764-65, 96 S.Ct. 1817, 1827, 48 L.Ed.2d 346 (1976) (holding commercial

speech to be protected although "not all commercial messages contain the same or even a very great public interest element").

The majority suggests that plaintiffs are free to engage in First Amendment activity in the subway provided that they do not request donations. This is precisely the argument that was rejected in *Schaumburg* as "represent[ing] a far too limited view of [the] . . . cases relevant to canvassing and soliciting by religious and charitable organizations." 444 U.S. at 628, 100 S.Ct. at 831. The rationale for the Supreme Court's rejection of this argument was that charitable organizations would be unable to continue their advocacy and dissemination of ideas without the ability to solicit donations. 444 U.S. at 632, 100 S.Ct. at 833. The majority acknowledges the importance of contributions to a charitable organization's work, but fails to recognize that a beggar's First Amendment activity is no less dependent on his requests for money. In the seclusion of a judge's chambers, it is tempting to assume that beggars could obtain jobs and spend their free time distributing leaflets or buttonholing passersby in the subway to further the cause of the homeless and poor. The record in this case, however, permits no such speculation. Plaintiff Young states in his affidavit, for example, that he solicits money in the subway so that he can buy food, medicine and other essentials, and take the subway to the Bronx, where he sometimes earns enough money unloading trucks to rent a room for the night. He receives no public assistance. Plaintiff Walley, who is fifty years old, states that he solicits donations because he is unable to find work. If he sleeps in a shelter, he receives reduced public assistance of $21.50 every two weeks. Plaintiff Gilmore's solicitation also is the result of her need for food and

medical treatment. To suggest that these individuals, who are obviously struggling to survive, are free to engage in First Amendment activity in their spare time ignores the harsh reality of the life of the urban poor.

Because begging is speech protected by the First Amendment, it is necessary to determine whether the TA regulations withstand the proper level of scrutiny. I agree with the majority that the TA's regulation is content-neutral. Defendants have offered substantial evidence to support their claim that the regulations are aimed at the secondary effects of begging such as increased crime and traffic congestion, rather than at any message conveyed by the beggars. *See City of Renton* v. *Playtime Theatres, Inc.*, 475 U.S. 41, 48, 106 S.Ct. 925, 929, 89 L.Ed.2d 29 (1986) (zoning restriction applicable to adult movie theaters content-neutral because aimed at secondary effects of such theaters); *see also Boos* v. *Barry*, 485 U.S. 312, 320-21, 108 S.Ct. 1157, 1163, 99 L.Ed.2d 333 (1988) (discussing *Renton*). I have serious doubts, however, that holding the regulation content-neutral automatically means that it must be analyzed under what the majority terms the "relaxed" standard of *United States* v. *O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968). I question the application of *O'Brien* for two reasons. First, begging, like charitable solicitation, is protected speech, and therefore a direct restriction on it must be "subjected . . . to exacting First Amendment scrutiny." *Riley*, 108 S.Ct. at 2673. Second, *O'Brien* has generally been applied to cases involving symbolic conduct rather than speech in the normal sense of the word. *See Ward* v. *Rock Against Racism*, — U.S. —, 109 S.Ct. 2746, 2757, 105 L.Ed.2d 661 (1989) (applying time, place or manner analysis to content-neutral regulation and referring to *O'Brien* as "the

case in which we established the standard for judging the validity of restrictions on expressive conduct"). The protected expression in this case is the beggars' speech incident to their solicitation of alms, not symbolic conduct.

As the majority apparently recognizes, however, it makes little difference whether the regulations in issue are judged under *O'Brien* or under the traditional time, place or manner standard because the two tests are essentially the same with respect to content-neutral regulations. *See Rock Against Racism*, 109 S.Ct. at 2757; *Clark* v. *Community for Creative Non-Violence*, 468 U.S. 288, 298, 104 S.Ct. 3065, 3071, 82 L.Ed.2d 221 (1984); *see also id.* at 308 n. 6, 104 S.Ct. at 3076 n. 6 (Marshall, *J.*, dissenting). The only element of *O'Brien* on which I disagree with the majority is the fourth, namely, whether the regulation is no greater than is essential to the furtherance of the government's interest. This element corresponds to the narrow tailoring requirement of the time, place or manner analysis. Because no symbolic speech is involved here, I will use the time, place or manner analysis that applies to speech in a public forum.

The TA clearly has created a limited public forum by designating certain areas of the subway system in which charitable solicitation may take place. The majority emphasizes that the TA never intended to open the subway to begging, and that the grant of selective access does not create a public forum for all purposes. While the government's intent is "critical" to the determination that a limited public forum was created, *see Deeper Life Christian Fellowship, Inc.* v. *Board of Educ.*, 852 F.2d 676, 680 (2d Cir.1988), the fact is defendants intended to open, and did open, certain areas to solicitation by organized charities. Simply put, the TA designated certain areas in which

charitable groups could ask passersby for money. As discussed above, begging is indistinguishable from charitable solicitation for First Amendment purposes. To hold otherwise would mean that an individual's plight is worthy of less protection in the eyes of the law than the interests addressed by an organized group. No court has ever so ruled. Defendants therefore may not open the door to the latter while slamming it in the face of the former. *See Perry Educ. Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 48, 103 S.Ct. 948, 956, 74 L.Ed.2d 794 (1983) (designated public forum open "to other entities of similar character"). This conclusion is further compelled by defendants' failure to submit any evidence that charitable solicitation does not have the same adverse effects (*e.g.*, impeding traffic, intimidating passengers) that begging is claimed to have.[1] In the absence of such evidence, defendants' contention that begging is not of the same general nature as solicitation by organized charities is nothing more than rank speculation.

I cannot agree that *Gannett Satellite Information Network, Inc.* v. *Metropolitan Transportation Authority*, 745 F.2d 767 (2d Cir.1984), is dispositive of the status of the subway as a public forum. *Gannett* involved a challenge to a licensing scheme for the placement of newspaper vending machines in

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[1] The majority notes that the record contains no indication that passengers feel intimidated by organized charities, and concludes that this absence of evidence supports the TA's distinction between begging and charitable solicitation. The reason for this lack of evidence is that, while the TA engaged in an enormous effort to gauge passenger reaction to begging, it never inquired how subway riders felt about being accosted by representatives of organized charities.

commuter railroad stations, not the New York City subway. *Id.* at 770-71. Even if *Gannett's* holding that those commuter stations are neither traditional nor designated public forums could be extended to the subway, the district court was correct in holding that *Gannett* has little precedential value in the present case because it was decided prior to the TA's creation of a designated forum for charitable solicitation.

The status of the Port Authority Bus Terminal as a public forum was established in *Wolin* v. *Port of New York Authority*, 392 F.2d 83, 88-91 (2d Cir.) (suggesting that Port Authority is a traditional public forum), *cert. denied*, 393 U.S. 940, 89 S.Ct. 290, 21 L.Ed.2d 275 (1968), and defendants present no persuasive argument that *Wolin* is no longer good law. Furthermore, no re-examination of *Wolin* is necessary in this case because it is clear that those areas in which the Port Authority allows expressive activities to take place constitute a designated public forum for the same reasons set forth above with respect to the subway system.

Because I believe that, in light of Supreme Court precedent, begging is protected expression and that the areas in which it is currently banned are public forums, I next turn to the question whether the regulations in issue can survive the appropriate level of scrutiny. Content-neutral regulations like the ones in question will be upheld as reasonable time, place or manner restrictions if they are "narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." *Perry*, 460 U.S. at 45, 103 S.Ct. at 955; *see also Frisby* v. *Schultz*, 487 U.S. 474, 479-80, 108 S.Ct. 2495, 2499, 101 L.Ed.2d 420 (1988).

While the interests that defendants advance are certainly significant, *e.g.*, protection of the public from harassment, preservation of the quality of life, and maintenance of a safe transit system, the regulations are not narrowly tailored to achieve these interests because they burden a substantial amount of speech that does not implicate the TA's interests. The majority is correct that even a complete ban may in some instances constitute a reasonable time, place or manner restriction, *see, e.g.*, *Community for Creative Non-Violence*, 468 U.S. at 296, 104 S.Ct. at 3070, and that a regulation need not be the least restrictive means of achieving the government's objective in order to be narrowly tailored. *See Rock Against Racism*, 109 S.Ct. at 2757-58 (narrow tailoring requirement met as long as government interest would be achieved less effectively absent the regulation and it does not burden substantially more speech than necessary). As the district court noted, however, the regulations in this case do not distinguish between passive begging such as a blind man rattling a cup full of change or a homeless person politely requesting money, which would hardly daunt the average New Yorker, and aggressive behavior such as the panhandler who accosts and intimidates subway riders. The evidence submitted by the TA indicates that this aggressive, intimidating behavior is the primary evil that prompted the TA's ban on begging. For example, Bernard Jacobs, a Detective of the New York City Transit Police Department, supports the ban on begging by stating in his affidavit that "passengers feel harassed and intimidated by panhandlers." Similarly, Carl Green, Assistant Vice President for Government Relations of the TA, states that "[t]he policy dictating enforcement of the [ban on begging] is directed against behavior which [our] passengers believe to be intimidating." The TA certainly is free to prevent harassing,

intimidating behavior, which existing regulations allow it to do. *See Texas* v. *Johnson*, 109 S.Ct. 2533, 2542 (1989) (existence of a statute specifically prohibiting breaches of the peace "tends to confirm that Texas need not punish . . . flag desecration in order to keep the peace"). The TA has made no showing, however, that passengers perceive all, or even a large percentage, of people who solicit alms in the subway as belligerent or frightening. In addition, there has been no showing that subway riders do not feel harassed when approached by representatives of an organized charity. Thus, the TA may protect its passengers by prohibiting the specific conduct that adversely affects the subway environment, and may address safety concerns such as traffic flow by restricting peaceful begging to areas in which charitable solicitation is allowed. *See Secretary of State of Maryland* v. *Joseph H. Munson Co.*, 467 U.S. 947, 966-67, 104 S.Ct. 2839, 2852, 81 L.Ed.2d 786 (1984) (restriction on fundraising not sufficiently narrowly tailored to achieve state's interest of preventing fraud). The complete ban on begging, however, burdens substantially more speech than necessary, and therefore is not narrowly tailored to achieve the government's interests. *See Rock Against Racism*, 109 S.Ct. at 2758; *Frisby*, 487 U.S. at 485, 108 S.Ct. at 2502 (complete ban is narrowly tailored "only if each activity within the proscription's scope is an appropriately targeted evil").

In sum, begging is speech protected by the First Amendment that may be regulated, but not entirely prohibited, to achieve the government interests advanced in this case. I recognize that the presence of large numbers of beggars in the subway presents a serious problem for the TA and contributes to the sense of chaos and frustration

experienced by the many hard-working New Yorkers who rely on the subway system. Had the TA's regulations continued to bar all charitable solicitation in the subways, I would uphold them because no public forum would have been created. I simply fail to see why the TA should be able to permit organized charities, but not beggars, to rattle a cup full of change as one passes by.

For the foregoing reasons, I respectfully dissent.

APPENDIX B

B1

Opinion and Order of the United States District Court for the Southern District of New York

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 89 CIV 7871 (LBS).

William B. YOUNG, Jr., and Joseph Walley, on behalf of themselves and all other persons who are similarly situated; and, Legal Action Center Homeless, Plaintiffs,

Sheron Gilmore, Plaintiff-Intervenor,

v.

NEW YORK CITY TRANSIT AUTHORITY, Metropolitan Transportation Authority of the State of New York, Metro-North Commuter Railroad Company, The Long Island Rail Road Company, The Port Authority of New York and New Jersey, and Robert R. Kiley, as Chairman of the New York City Transit Authority, the Metropolitan Transportation Authority of the State of New York, the Metro-North Commuter Railroad Company, and The Long Island Rail Road Company, and Robert Abrams, as Attorney General of the State of New York, Defendants.

January 25, 1990

As Amended January 29, 1990

SAND, District Judge

Plaintiffs, two homeless men who solicit money for themselves in the New York City transit system, bring this action on behalf of themselves and all other persons similarly situated, alleging that various regulations and New York Penal Law § 240.35(1) infringe upon their right to free

speech under the First Amendment. Plaintiffs move to amend their complaint, for an order determining that this action is maintainable as a class action, and for a preliminary injunction restraining defendants from enforcing, either through the challenged provisions or any other rule, regulation or statute, a ban on solicitations of money by plaintiffs. For the reasons stated below, plaintiffs' motions are granted in substance without prejudice to the adoption by defendants of reasonable time, place and manner of exercise restrictions on the conduct in question.

I. BACKGROUND

In August 1989, the Metropolitan Transportation Authority (hereinafter "MTA") Board adopted certain revisions to the New York City Transit Authority (hereinafter "TA") Rules governing use of the transit facilities. An existing rule prohibited any person, unless "duly authorized" by the TA, from soliciting "upon any facility or conveyance . . . alms, subscription or contribution for any purpose."[1] 21 State of New York Codes, Rules and Regulations (hereinafter "NYCRR") 1050.6(b) (1976). To this rule was added a provision which "deemed to be authorized" certain non-transit uses including: "public speaking; distribution of written materials; solicitation for charitable, religious or

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[1] "Facilities" was defined as all "property and equipment, . . . and real estate and personalty used or held incidental to the operation . . . of any rapid transit railroad or omnibus line . . ." 21 NYCRR 1050.2(b). "Conveyances" is described as "any subway or rapid transit or train, locomotive, omnibus or other vehicle . . . used as a means of transportation of passengers." 21 NYCRR 1050.2(e).

political causes; and artistic performances, including the acceptance of donations." 21 NYCRR 1050.6(c). Regulations 1050.6(c)(1)-(7) also subjected these non-transit uses to specific express time, place and manner restrictions. These restrictions prohibited the "authorized" non-transit uses in areas not generally open to the public and in subway cars. With the exception of leafletting or distributing literature, campaigning, public speaking or similar activities with no sound production device and no physical obstruction, non-transit uses were also prohibited within twenty-five feet of a token booth or within fifty feet from the marked entrance to a TA office or tower. The amended rules became effective on October 25, 1989.

On October 17, 1989, the TA commenced an information campaign which it labeled "Operation Enforcement." As part of the operation, the TA distributed 1.5 million pamphlets entitled *Introducing Operation Enforcement* which warned that anyone violating the new rules governing behavior in the transit system would be "subject to arrest, fine and/or ejection." "No panhandling or begging" was included in a list of prohibited acts. Over twenty thousand posters of various types were also prepared to publicize the campaign. A single line in all the posters warned that panhandling and begging would lead to arrest, fine and/or ejectment.

Plaintiffs Young and Walley,[2] both homeless men who solicit money entirely for their own benefit throughout the subway system, affirm that they were told by TA police that

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[2] Plaintiff Legal Action Center for the Homeless is a not-for-profit organization that provides the homeless with various legal and social services.

they could not panhandle and that they would be arrested if they were caught doing so. Both plaintiffs also contend that since the commencement of Operation Enforcement, they were directed on several occasions to vacate subway platforms or cars. Plaintiffs attest that their conduct consists of approaching passers-by in subway stations, on platforms and in walkways, asking them for money, and answering any questions they might have.

On November 28, 1989 plaintiffs commenced this action on behalf of themselves and a class defined as all homeless or needy persons who are or will be asking or soliciting others for charity in the train or bus or subway stations of New York City or all other places within the jurisdiction of defendants where this is prohibited. Plaintiffs allege that the TA rules violated their rights under the First and Fourteenth Amendments of the United States Constitution and Article 1, §§ 6, 8 & 11 of the New York State Constitution.[3] On

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[3] Plaintiffs originally named as defendants the MTA, the TA, Metro-North Commuter Railroad Company (hereinafter "Metro-North"), and Robert Kiley, Chairman of the TA, the MTA, and Metro-North. The MTA, a public benefit corporation consisting of a chairman and sixteen other members appointed by the Governor with Senate advice and consent, has responsibility for the continuation, development and improvement of commuter transportation and other services related thereto in a district encompassing the city of New York and the counties of Dutchess, Nassau, Orange, Putnam, Rockland, Suffolk and Westchester. New York Public Authorities Law §§ 1262-64 (McKinney 1982 & Supp.1990). The TA, a public benefit corporation consisting of the chairman and members of the MTA, is responsible for the acquisition and operation of transit

(continued...)

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December 1, 1989, this Court heard oral argument on plaintiffs' application for a preliminary injunction. Before the Court, plaintiffs confirmed that they were not challenging the TA's authority to apply the time, place and manner restrictions outlined in § 1050.6(c) to their conduct, but rather were contesting defendants' decision to distinguish plaintiffs from others soliciting for charitable purposes.[4] In the course of oral argument, the Court granted Sheron Gilmore's motion to intervene as a plaintiff,[5] directed the parties to brief certain additional issues, encouraged the parties to explore a consensual resolution of the case in light of plaintiffs' expressed willingness to agree to reasonable time, place and manner restrictions, and enjoined defendants from putting up or distributing additional posters.

In the interim, the TA once again amended 21 NYCRR 1050.6(b) & (c). The amended rule provides:

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[3](...continued)

facilities in New York City. *Id.* at § 1201-02. Metro-North, an MTA subsidiary composed of a chairman and members of the MTA, is responsible for running the Harlem, Hudson and New Haven lines. *The Green Book 1989-90 The Official Directory of the City of New York* at 319 (1989).

[4] *See* Transcript of Oral Argument dated December 1, 1989 at 9-10.

[5] Like Plaintiffs Young and Walley, Ms. Gilmore solicits money in the subways, and she also alleges that TA police have attempted to prevent her from doing so. Plaintiff-Intervenor Gilmore is represented by The Legal Aid Society.

(b) No person, unless duly authorized by the Authority, shall engage in any commercial activity upon any facility or conveyance. Commercial activities include (1) the advertising, display, sale, lease, offer for sale or lease, or distribution of food, goods, services or entertainment (including the free distribution of promotional goods or materials), and (2) the solicitation of money or payment for food, goods, services or entertainment. No person shall panhandle or beg upon any facility or conveyance.

(c) Except as expressly authorized and permitted in this subsection (c), no person shall engage in any non-transit uses upon any facility or conveyance. Non-transit uses are non-commercial activities that are not directly related to the use of a facility or conveyance for transportation. The following non-transit uses are authorized and permitted by the Authority, provided they do not impede transit activities and they are conducted in accordance with the rules governing the conduct and safety of the public in the use of facilities of New York City Transit Authority and Manhattan and Bronx Surface Transit Operating Authority: public speaking; distribution of written non-commercial materials; artistic performances, including the acceptance of donations; solicitation for religious or political causes; solicitation for charities that (1) have been licensed for any public solicitation within the preceding twelve months by the Commissioner of Social Services of the City of New York under § 21-111 of the Administrative Code of the City of New York or any successor provision, or (2) are duly registered as charitable organizations with the Secretary of State of the State of New York under § 172 of the New York Executive Law or any successor provision, or (3) are

> exempt from federal income tax under § 501(c)(3) of the United States Internal Revenue Code or any successor provision. Solicitors for such charities shall provide, upon request, evidence that such charity meets one of the preceding qualifications.

Defendants' Fourth Memorandum in Opposition to Plaintiffs' Motion for Preliminary Injunction at 2-3. On December 15, 1989, the Court wrote the Attorney General of the State of New York, Robert Abrams, to provide notice that this case appeared to call into question the constitutionality of New York Penal Law § 240.35(1) (McKinney 1989). § 240.35(1) stipulates that: "[A] person is guilty of loitering when he . . . [l]oiters, remains or wanders about in a public place for the purpose of begging . . ."

On December 18, 1989 the Court heard additional oral argument and issued an order, pursuant to an oral opinion,[6] temporarily restraining defendants from enforcing the amended rules insofar as they prohibited begging or panhandling in areas in which the TA authorized charitable solicitation. At the Court's suggestion, plaintiffs agreed to file an amended complaint explicitly challenging New York Penal Law § 240.35(1) and naming the New York State Attorney General as a defendant. This action was prompted by defendants' assertion that transit police, as duly authorized peace officers, were doing no more than enforcing that provision of the state penal law.

On December 27, 1989, plaintiffs filed an amended complaint which, in addition to naming the Attorney General

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[6] *See* Transcript of Oral Argument dated December 18, 1989.

as a party defendant[7] and challenging § 240.35(1), named the Port Authority of New York and New Jersey[8] (hereinafter "Port Authority") and the Long Island Rail Road Company as defendants and alleged that various rules governing the World Trade Center and the Port Authority Bus Terminal also violated the United States and New York State Constitutions. One of those provisions provides that:

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[7] The Attorney General argues that because he has no statutory authority to enforce the challenged provisions, plaintiffs' amended complaint does not assert any cause of action against him. At oral argument, counsel for the Attorney General indicated that he would continue to participate in the case whether or not the Attorney General remained a party. *See* Transcript of Oral Argument dated January 22, 1990 at 33. Insofar as plaintiffs' complaint may be read as seeking relief against the Attorney General other than a declaration of unconstitutionality of § 240.35(1), it fails to state a claim and is dismissed. The sole purpose of naming the Attorney General as a party was to insure his participation at all stages of this proceeding.

[8] The Port Authority of New York and New Jersey, whose jurisdiction includes the Port Authority Bus Terminal and the World Trade Center, is a body corporate and politic created pursuant to a compact between the States of New York and New Jersey for the purpose of developing the Port of New York. New York Unconsolidated Laws § 6403 (McKinney 1979). The Long Island Rail Road Company, an MTA subsidiary composed of the chairman and members of the MTA, provides commuter and freight services within the counties of Nassau and Suffolk and within New York City. *The Green Book 1989-90 The Official Directory of the City of New York* at 318 (1989).

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"[n]o person shall solicit funds or contributions for any purpose at the [Port Authority Bus] Terminal without permission." 21 NYCRR 1220.16.[9] In its brief, the Port Authority represents that in practice permits are given for First Amendment activities in the World Trade Center and the Port Authority Bus Terminal on a first-come, first-served basis. *See* Memorandum of Port Authority in Opposition to Motion for Preliminary Injunction at 5. However, because the Port Authority interprets Penal Law § 240.35(1) as prohibiting begging and panhandling, no permits are issued for those particular purposes. *Id.*

On January 22, 1990, during a third session of oral argument, plaintiffs agreed to move to include all twelve Commissioners of the Port Authority as defendants instead of only the Chairman of the Board of Commissioners[10] and to seek certification of a class composed of all needy persons (regardless of their status of homelessness) who live in New York, who are or will be asking or soliciting others for charity for their own benefit in the train, bus or subway stations of New York City or all other places within the

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[9] The additional provisions of the World Trade Center and Port Authority Bus Terminal Revised Rules and Regulations implicated by the claims in this case include: 21 NYCRR 1220.25 ("No person, unless duly authorized by the Port Authority, shall, in ... the [Port Authority Bus] Terminal ... solicit alms"); 21 NYCRR 1290.3 ("No person at the World Trade Center, unless duly authorized in writing by the Port Authority, shall ... solicit funds for any purpose.")

[10] *See* Transcript of Oral Argument dated January 22, 1990 at 20.

jurisdiction of defendants.[11] Counsel for the TA clarified that while one of the purposes of the TA regulation was to enforce the New York penal provision, the regulation would continue to be enforced regardless of the validity of the statutory provision.[12] The Court requested additional submissions, due on January 30, 1990, on the issue whether any relief the Court granted should be preliminary or permanent, and reserved decision.

II. DISCUSSION

A. *Motion to Amend Complaint*

Plaintiffs seek leave to amend their complaint to add as defendants the twelve members of the Board of Commissioners of the Port Authority of New York and New Jersey, and to expressly include 21 NYCRR 1220.16, 21 NYCRR 1220.25, and 21 NYCRR 1290.3 within the ambit of the phrase "any other law, rule, or regulation." Fed. R. Civ. P. 15 provides that such leave is to be "freely given when justice so requires." Plaintiffs' motion is granted.

B. *Motion to Certify Class*

Plaintiffs also move for an order pursuant to Fed. R. Civ. P. 23(c)(1) determining that this action is maintainable as a class action. The proposed class is now defined as "all needy persons who live in the State of New York, who are or will

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[11] *See* Transcript of Oral Argument dated January 22, 1990 at 9-12.

[12] *See* Transcript of Oral Argument dated January 22, 1990 at 43-44.

be asking or soliciting others for charity for their own benefit in the train, bus or subway stations of New York City or all other places within the jurisdiction of defendants where this is presently prohibited." The Court finds no merit to defendants' argument that plaintiffs are not proper class representatives or that the proposed class is a geographically overbroad class. Plaintiffs have challenged a statute and regulations that, if taken together, prohibit begging and panhandling throughout the state. Moreover, there is no reason to believe that plaintiffs cannot adequately represent non-residents of New York City who wish to solicit money in the City transit system or needy people who wish to solicit money in areas within the defendants' jurisdiction outside New York City. The Court reserves decision on whether the Legal Action Center for the Homeless should be either a party or a class representative in this action. Since individual class members are named as parties plaintiff, the status of the Center as a party plaintiff is not critical to plaintiffs' motions. Plaintiffs' motion for class certification is therefore granted.

C. *Standards for Preliminary Injunction*

Plaintiffs' application is for a preliminary injunction. In the Second Circuit, a party seeking injunctive relief must establish that the injunction is necessary to prevent irreparable harm and either (i) that he is likely to prevail on the merits of the case or (ii) there exist "sufficiently serious questions going to the merits as to make them a fair ground for litigation, together with a balance of hardships tipping decidedly toward the movant." *Abdul Wali* v. *Coughlin*, 754 F.2d 1015, 1025 (2d Cir. 1985). There are also at least two instances where a heightened showing is required. First, when the preliminary injunction is mandatory as opposed to

prohibitory, an injunction should issue "'only upon a clear showing that the moving party is entitled to the relief requested,' or where 'extreme or very serious damage will result' from a denial of preliminary relief." *Id.* (citations omitted).[13] Second, where a preliminary injunction will grant a party all the relief he seeks, the party must show "a substantial likelihood of success on the merits, *i.e.*, that their cause is considerably more likely to succeed than fail . . ." *Id.* at 1026.

The injunction sought in this case, like the injunction in *Abdul Wali*, is more prohibitory than mandatory.[14] While the status quo would be upset by the injunction, the relief would essentially prevent the defendants from enforcing the rules and would not require any affirmative act other than the obliteration of the single line in the TA's posters which lists begging or panhandling as a proscribed activity.

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[13] The Court in *Abdul Wali* also recognized the limited utility of the distinction between mandatory and prohibitory injunctions, observing that in many instances the difference was "more semantical than substantive." 754 F.2d at 1025.

[14] In *Abdul Wali*, inmates of New York correctional facilities sought to enjoin the prison officials from preventing inmates from receiving copies of a report containing criticisms and complaints about the conditions at the Attica facility. The Court noted that the inquiry must go beyond simply determining whether or not the *status quo* will be maintained. *Id.* at 1025. Contrasting the relief actually sought with a hypothetical injunction requiring prison officials to furnish copies of the report to the inmates, the Court found the injunction to be "more prohibitory than mandatory." *Id.* at 1026.

The injunction sought in this case would also not grant the plaintiffs all the relief they seek. In *Abdul Wali* the plaintiffs only sought access to the report, and once the prison officials were enjoined from preventing the inmates from receiving it, plaintiffs had received all the relief they sought. This case is more like *Eng* v. *Smith*, 849 F.2d 80 (2d Cir. 1988), where the Second Circuit affirmed a district court injunction which required prison officials to maintain mental health services in accordance with certain specified procedures. The Court in *Eng* found that preliminary relief would not be complete because the injunction would end if the plaintiffs' claims ultimately proved unsuccessful. *Id.* at 82. Here, as in *Eng*, the preliminary injunction will terminate if plaintiffs' claims are not ultimately successful.

Since a heightened showing is not required in this case, plaintiffs must demonstrate that they will suffer an irreparable harm and either (i) that they are likely to prevail on the merits or (ii) that there exist sufficiently serious questions going to the merits as to make them a fair ground for litigation and that the balance of hardships tips decidedly toward plaintiffs.

D. *Irreparable Harm*

The named plaintiffs have affirmed that they rely upon panhandling and begging for their very survival. Defendants have indicated that panhandlers and beggars can be punished with ejection from transit terminals and facilities. The Court takes judicial notice of the fact that cold winter temperatures presently await these ejected panhandlers and beggars. In addition, the Supreme Court has held that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod* v.

Burns, 427 U.S. 347, 373, 96 S. Ct. 2673, 2689, 49 L. Ed. 2d 547 (1976). Thus, if plaintiffs show that enforcement of the various rules and regulations violates their First Amendment rights, they will have demonstrated irreparable injury and that the balance of hardships tips decidedly in their favor.

E. *The Merits*

Plaintiffs allege that the challenged rules and regulations, both on their face and as applied to plaintiffs, violate their rights to freedom of speech under the First Amendment of the United States Constitution.[15] Plaintiffs argue further that the challenged rules and regulations are nothing more than anti-loitering provisions, violative of their due process rights, and a pretext for evicting the homeless and destitute from locations under the jurisdiction of defendants. For their part, defendants maintain that panhandling and begging are not protected speech, that the transit system is not a traditional or designated public forum, and that the prohibitions on panhandling and begging serve significant state interests which would justify the regulation of speech. The Court will examine these issues with an eye toward determining whether there exist sufficiently serious questions going to the merits of the dispute as to make them a fair ground for litigation or whether plaintiffs have shown a likelihood of success on the merits.

1. New York Penal Law § 240.35(1)

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[15] The First Amendment provides: "Congress shall make no law . . . abridging the freedom of speech[.]" U.S. Const. amend. I.

Since the TA has argued that its regulation is designed at least in part to enforce the state penal provision, and since the Port Authority has cited the penal provision to explain its refusal to grant permits for begging, we begin our analysis by considering New York Penal Law § 240.35(1). Section 240.35(1) is challenged as violative of Article I, § 6 (due process) of the New York State Constitution.[16]

In *People* v. *Bright*, 71 N.Y.2d 376, 526 N.Y.S.2d 66, 520 N.E.2d 1355 (1988), the New York Court of Appeals outlined a test that loitering statutes must pass under the Due Process Clause of the New York Constitution. Such statutes will be upheld "only when they either prohibit[ ] loitering for a specific illegal purpose or loitering in a specific place of restricted access." *Id.* at 384, 526 N.Y.S.2d 66, 520 N.E.2d 1355 (citations omitted). Section 240.35(1),which prohibits loitering in a public place for the purpose of begging, fails this test. First, by definition, a "public place" cannot also be a place of restricted access. *Cf. People* v. *Johnson*, 6 N.Y.2d 549, 190 N.Y.S.2d 694, 161 N.E.2d 9 (1959) (upholding provision prohibiting loitering in school buildings, where access was restricted); *People* v. *Merolla*, 9 N.Y.2d 62, 211 N.Y.S.2d 155, 172 N.E.2d 541 (1961) (finding statute prohibiting loitering for other than lawful purposes on waterfront, which serviced only commercial needs of shippers, to be constitutional). Second, begging alone does not appear to be unlawful. There is no other provision of New York law which prohibits begging itself. *Cf. People* v. *Smith*, 44 N.Y.2d 613, 407 N.Y.S.2d 462,

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[16] Article I, § 6 provides: "No person shall be deprived of life, liberty or property without due process of law." N.Y. Const. art. I, § 6.

378 N.E.2d 1032 (1978) (upholding statute prohibiting loitering for the purpose of committing unlawful act of prostitution); *People* v. *Pagnotta*, 25 N.Y.2d 333, 305 N.Y.S.2d 484, 253 N.E.2d 202 (1969) (finding statute which made it illegal to loiter for purpose of committing crime of possessing or using narcotic drugs to be constitutional).

The Attorney General argues in his memorandum, *see* Memorandum of Law of Attorney General at 11, that § 240.35(1) by its own terms also makes begging illegal. *But see* Transcript of Oral Argument January 22, 1990 at 34-35. However, the statute cannot be read as the Attorney General's memorandum suggests, for it clearly prohibits only loitering for the purpose of begging, not begging in and of itself. One may loiter and not beg; one may beg and not loiter. One can beg without loitering with the intent to beg by, for example, begging door-to-door or selecting a single passer-by to solicit and then leaving the vicinity immediately. Conceivably, one may even beg by mail. Moreover, if a prohibition on loitering for a specific purpose could have the consequence of declaring that purpose illegal even absent a specific prohibition on such conduct in a non-loitering context, the New York Court of Appeals test enunciated in *Bright* would be significantly undermined.

The case before the Court resembles *People* v. *Uplinger*, 58 N.Y.2d 936, 937, 460 N.Y.S.2d 514, 515, 447 N.E.2d 62, 63 (1983), *cert. dismissed as improvidently granted*, 467 U.S. 246, 104 S. Ct. 2332, 81 L. Ed. 2d 201 (1984), where the Court of Appeals struck down a statute which made it a crime to loiter "in a public place for the purpose of engaging, or soliciting another person to engage, in deviate sexual intercourse or other sexual behavior of a deviate nature. . . ." The Court found that: "Inasmuch as the

conduct ultimately contemplated by the loitering statute may not be deemed criminal, we perceive no basis upon which the State may continue to punish loitering for that purpose." *Id.* Here, the conduct at issue, begging, has not been made criminal, and the state similarly has no basis upon which to continue prohibiting loitering with the intent to beg.

Absent some clearer indication of legislative intent, there is simply no basis for the Court to conclude that the state legislature, once clearly confronted with the issue, would choose to criminalize all begging. As plaintiffs note, begging has at times been recognized as socially acceptable conduct which several religions appear to sanction and to bestow praise upon those who respond to beggars' entreaties. The statute in question antedates the numerous decisions of the United States Supreme Court[17] and the New York State Court of Appeals[18] invalidating loitering statutes. Rather than a blanket prohibition on begging, the legislature might see fit to adopt reasonable time, place and manner restrictions. Or, the state legislature might see fit to leave the question solely for resolution by local authorities.

Given all the unanswered questions, the resolution of which is in the first instance a legislative not a judicial

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[17] *See Kolender* v. *Lawson*, 461 U.S. 352, 103 S. Ct. 1855, 75 L. Ed. 2d 903 (1983); *Papachristou* v. *City of Jacksonville*, 405 U.S. 156, 92 S. Ct. 839, 31 L. Ed. 2d 110 (1972).

[18] *See People* v. *Bright, supra*; *People* v. *Uplinger, supra*; *People* v. *Berck*, 32 N.Y.2d 567, 347 N.Y.S.2d 33, 300 N.E.2d 411, *cert. denied*, 414 U.S. 1093, 94 S. Ct. 724, 38 L. Ed. 2d 550 (1973); *People* v. *Diaz*, 4 N.Y.2d 469, 176 N.Y.S.2d 313, 151 N.E.2d 871 (1958).

function, and the requirement that a penal statute clearly define and give sufficient notice of the conduct that is proscribed, the Court finds that New York Penal Law § 240.35(1) violates the due process clause of the New York Constitution. Having rejected § 240.35(1) as a predicate for regulating begging, the Court turns its focus to the TA and Port Authority regulations challenged by plaintiffs.

2. First Amendment Protection for Panhandling and Begging

The TA asserts that regardless of the validity of § 240.35(1), its regulations, which prohibit begging and make no reference to loitering, are valid. Even if one assumes that begging, apart from loitering for that purpose, is not per se unlawful, it does not follow that it is conduct which the defendants may not prohibit. Not every lawful activity may be conducted on transit facilities. The first question for the Court to answer therefore is whether panhandling or begging is protected by the First Amendment.

Neither New York Penal Law § 240.35(1) nor any of the regulations adopted by defendants provides a definition for either begging or panhandling. The Random House Dictionary of the English Language defines "beg" as "to ask for as a gift, as charity or as a favor: to beg alms." The Random House Dictionary of the English Language, 188, 1402 (2d Ed. 1987). "Panhandle" is defined as "to accost passers-by on the street and beg from them." *Id.* Other dictionaries draw less of a distinction between the two terms, eliminating from the definition of panhandling the connotations of assault or harassment that can be associated

with the term "accosting."[19] Although one court has based its decision on a distinction between accosting for the purpose of begging and simply begging,[20] all the regulations challenged by plaintiffs are directed toward either begging or soliciting alms, not just panhandling. As a result, all the parties to this case and the Court agree that any distinction between panhandling and begging should not be dispositive of this motion.

a) *First Amendment Protection of Solicitations for Money*

In a series of cases, the Supreme Court has addressed the extent to which solicitations for money are protected by the First Amendment. In *Schaumburg* v. *Citizens for a Better Env't*, 444 U.S. 620, 100 S. Ct. 826, 63 L. Ed. 2d 73 (1980), the Supreme Court struck down a statute which prohibited solicitation of contributions by charitable organizations that did not use at least 75 percent of their receipts for charitable purposes. The Court observed that charitable appeals for funds "involve a variety of speech interests—communication of information, the dissemination

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[19] *See* The American Heritage Dictionary of the English Language 118, 946 (1976) (defining beg as to "ask for as charity;" to "ask earnestly for, or of;" to "solicit alms;" and to "make a humble or urgent plea," and defining panhandle as to "beg, especially on the streets").

[20] *See Ulmer* v. *Municipal Court for Oakland-Piedmont J.D.*, 55 Cal. App. 3d 263, 127 Cal. Rptr. 445 (Ct. App. 1976) (upholding statute which prohibited accosting persons in any public place for the purpose of begging because it excluded person who merely "sits or stands by the wayside").

and propagation of views and ideas, and the advocacy of causes—that are within the protection of the First Amendment." *Id.* at 632, 100 S. Ct. at 834. More specifically, the act of solicitation itself was described as "intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues. . . ." *Id.* The Court did not define "charitable solicitations" or decide when, or if, a solicitation of money ever ceased to be informative or persuasive speech. However, the Court did stress its concern that the 75-percent rule burdened organizations whose primary purpose was not to provide money or services to the poor but to disseminate information or advocate positions on matters of public concern, implying that a solicitation which was not intended to benefit directly another person could still warrant protection. At the very least, the Court's holding indicates that a solicitation where 25% of the funds solicited might have been intended to benefit no one other than the solicitor could be considered protected speech.

In *Secretary of the State of Md.* v. *Joseph H. Munson Co.*, 467 U.S. 947, 104 S. Ct. 2839, 81 L. Ed. 2d 786 (1984), the Court struck down a statute which included a percentage limitation similar to the one in *Schaumburg* but also directed the Secretary of State to issue rules and regulations to permit a charitable organization to pay more than 25% of its gross income for expenses in connection with fundraising where the 25% limitation would prevent the organization from raising contributions. The Court reiterated that its concern was that the statute would restrict First Amendment activity which "results in high costs but is itself a part of the charity's goal," *id.* at 967, 104 S. Ct. at 2852, implying once again that the speech associated with solicitation may

require protection even if much of the money solicited was never intended to reach a suitable recipient of charity.

In *Riley* v. *National Fed'n of the Blind of N.C.*, 487 U.S. 781, 108 S. Ct. 2667, 101 L. Ed. 2d 669 (1988), the Court struck down a statutory scheme designed to regulate fees charged by professional fundraisers who engaged in charitable solicitations. Under the scheme, a fee consisting of 20% of the gross receipts was deemed reasonable; a fee between 20-35% was deemed unreasonable upon a showing that the solicitation did not involve the "dissemination of information, discussion, or advocacy relating to public issues as directed by the [charitable organization] which is to benefit from the solicitation;" and a fee exceeding 35% was presumed unreasonable, but the fundraiser had the opportunity to rebut the presumption by demonstrating that the fee was necessary either "(1) because the solicitation involved the dissemination of information or advocacy on public issues directed by the charity, or (2) because otherwise the charity's ability to raise money or communicate would be significantly diminished." *Id.* at 2671. The Court rejected the government's argument that even if charitable solicitations were generally fully protected, the statute regulated only commercial speech because it related only to the professional fundraiser's profit from the solicited contribution. The Court began by noting that it was "not clear that a professional's speech is necessarily commercial whenever it relates to that person's financial motivation for speaking." *Id.* at 2677. Even though the solicitor presumably intended to benefit only himself, the Court held that charitable solicitations such as those undertaken by professional fundraisers were "inextricably intertwined with otherwise fully protected speech." *Id.*

Because such expression could not be "parcel[ed] out" with one test applied to one phrase and another test applied to another phrase, only the test for fully protected expression was to be applied. *Id.*

The issue to be decided by this Court is whether a meaningful distinction can be drawn for First Amendment purposes between a professional fundraiser requesting a donation from a passer-by on behalf of a charitable organization and a similar request by a destitute individual on his own behalf. Among the possible distinctions that have been brought to the attention of the Court are the allegedly diminished communicative content of begging, the differences between the relative intents of the two types of solicitors, and the historical treatment of begging. Each of these possible distinctions will be considered in turn, and on the basis of the analysis presented below, the Court concludes that a meaningful distinction cannot be drawn for First Amendment purposes between solicitations for charity and begging.

1) *The Communicative Aspects of Begging*

Plaintiffs Young and Walley both affirm that their solicitations frequently provoke questions from passers-by and that they often describe to people what it is like to be homeless, express their views on public programs designed to assist them and advocate the cause of the homeless. *See* Affidavits and Supplemental Affidavits of Joseph Walley and William Young. The simple request for money by a beggar or panhandler cannot but remind the passer-by that people in the city live in poverty and often lack the essentials for survival. Even the beggar sitting in Grand Central Station with a tin cup at his feet conveys the message that he and

others like him are in need. While often disturbing and sometimes alarmingly graphic, begging is unmistakably informative and persuasive speech.

Both solicitors for organized charities and beggars approach passers-by, request a donation, and perhaps explain why they want the money. The conduct of both types of solicitors, as well as what they actually say, may often be quite similar. Although the beggars' entreaties may be more personal, emotionally charged and highly motivated, the substance is in essence a plea for charity. There has been no showing that plaintiffs' solicitations will inevitably contain more belligerent or threatening language. Other provisions, not here in question, prohibit certain forms of abusive or assaultive conduct. *See infra* p. 358. To argue, then, that solicitations for money by beggars have less communicative content than solicitations by organized charities is to differentiate more on the basis of the source of the speech than on its content. It is of course well established that "[t]he inherent worth of speech in terms of its capacity for informing the public does not depend upon the identity of its source. . . ." *First Nat'l Bank of Boston* v. *Bellotti*, 435 U.S. 765, 777, 98 S. Ct. 1407, 1416, 55 L. Ed. 2d 707 (1978).

2) *The Intentions of the Solicitor*

The professional fundraiser is soliciting money on behalf of charitable organizations which then presumably transfer the funds to worthy recipients. Defendants point out that whereas the beggar is soliciting money only for himself, the fundraiser intends at least part of the benefit of his solicitation to go to someone other than himself. In *Schaumburg, Munson* and *Riley*, the Supreme Court held that

the First Amendment protected charitable solicitations. In deciding whether begging is also protected under the rubric "charitable solicitations," the Court must confront the questions which the Supreme Court did not address in those cases: What constitutes a charitable solicitation? Is an intent to benefit someone other than the solicitor an essential component of a charitable solicitation?

There is nothing in the dictionary definition of "charity" which suggests that money given to a beggar who solicits it is not charity. The American Heritage Dictionary defines charity as "[t]he provision of help or relief to the poor" or "[s]omething that is given to help the needy." The American Heritage Dictionary of the English Language 226 (1976). Whether the donation is solicited by a fundraiser or directly by the recipient is simply not relevant to determining whether the solicitation was for charity.[21] Moreover, distinguishing between charitable and non-charitable solicitations on the basis of the intent of the solicitor would lead to the anomalous situation where one homeless person could not solicit for himself but two homeless people could solicit donations for each other.

That a speaker who seeks to make a profit from his speech can still be entitled to First Amendment protection is well established. *See Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. 748, 96 S. Ct. 1817,

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[21] Whether something is charity appears to depend more on the donor's motives than on the motives of the recipient. If a donor gives a quarter to a beggar to help that person because he is poor, the donation is charity, whether the donation was solicited by someone other than the recipient or the recipient himself.

48 L. Ed. 2d 346 (1976).[22] As was discussed earlier in this opinion, *see supra* pp. 351-52, the thrust of the Court's holdings in *Schaumburg*, *Munson* and *Riley* was that the speech associated with solicitation may require protection even if much of the money solicited was never intended to reach a suitable recipient of charity. Moreover, the *Riley* Court recognized that even a statute specifically designed to regulate speech related only to the professional fundraiser's profit from the solicited contribution could run afoul of the First Amendment. The Court concludes, therefore, that begging cannot be distinguished from charitable solicitations on the basis of the intent of the solicitor.

3) *The Historical Treatment of Begging*

Though begging has been regulated, monitored and at times prohibited throughout history, there is nothing to suggest that begging has been universally viewed with the rancor and enmity of, say, obscenity. *See generally Young* v. *American Mini Theatres, Inc.*, 427 U.S. 50, 70, 96 S. Ct.

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[22] "Speech . . . is protected even though it is carried in a form that is 'sold' for profit, and even though it may involve a solicitation to purchase or otherwise pay or contribute money." 425 U.S. at 761, 96 S. Ct. at 1825 (citations omitted). *See also Goldstein* v. *Town of Nantucket*, 477 F. Supp. 606, 609 (D.Mass.1979) (holding that street troubadour who accepts contributions during his public performances by act of accepting contributions does not dilute his First Amendment rights and fact that he accepts contributions does not broaden defendant's limited mandate to exercise impartial regulations upon the use of the sidewalks for public expression); *Bellotti*, 435 U.S. at 783, 98 S. Ct. at 1419; *Calash* v. *City of Bridgeport*, 788 F.2d 80, 82 (2d Cir. 1986).

2440, 2452, 49 L. Ed. 2d 310 (1976) (Stevens, J.). In early English common law, begging by those able to work was prohibited, but beggars who were unable to work were licensed and restricted to specific areas where their begging was permitted. 3 J. Stephen, *A History of the Criminal Law of England* 266-75 (1883). Thus, while reflecting a strong abhorrence to begging by those able to work, early English law contains no suggestion that beggars unable to work and in compliance with licensing or geographical restraints were engaged in unlawful conduct.

In New York in the Nineteenth Century, the crime of vagrancy encompassed solicitation of alms or charity by the "able bodied or sturdy" and "wandering abroad and begging" generally. Laws of 1833, c. 11 § 1. Such provisions were interpreted, at least with respect to children, as prohibiting asking for money, standing silently with a placard or holding out one's hand. *See Matter of Haller*, 3 Abbott's New Cases 65 (1st Dep't 1877). Presently in the United States, however, only 25 states have statutes pertaining to begging. Thirteen of these statutes do not proscribe begging but grant power to various authorities within the state to regulate and punish begging or some variation.[23] Two statutes adopt the old common law rule

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[23] Ark.Stat.Ann. § 14-54-1408 (1987) (City Council authorized to punish begging); Ill.Ann.Stat. ch. 24 para. 11-5-4 (Smith-Hurd 1962) (Corporate authority of each municipality); Mont.Code Ann. § 7-32-4304 (1989) (City and town council); Neb.Rev.Stat. § 14-102, cl. 23 (1987) (Cities of Metropolitan class); N.H.Rev.Stat.Ann. § 47:17, cl. XIII (Equity Publishing 1971) (City council); N.C.Gen.Stat. § 160A-179 (1987) (City);

(continued...)

and prohibit begging only by those able to work.[24] Four additional statutes resemble the New York penal provision and prohibit loitering for the purpose of begging.[25] The remaining states proscribe either begging or a form of activity analogous to begging.[26]

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[23](...continued)

N.D.Cent.Code § 40-05-01, cl. 43 (1989) (Municipalities); Ohio Rev.Code Ann. § 715.55 (Anderson 1966) (Municipal corporations); Utah Code Ann. § 10-8-51 (1986) (City); Wash.Rev.Code Ann. § 35.22.280 (1965) (First class cities); W.Va.Code § 8-21-10 (1984) (Board of Parks and Recreation Commission); Wyoming Stat. § 15-1-103 cl. (a)(xvii) (1980) (Governing bodies of all cities and towns given authority to restrain and punish "vagrancy, mendicants and prostitutes"); N.J.Stat.Ann. § 40:48-1(7) (West 1963) (Governing body of every municipality).

[24] La.Rev.Stat. § 14:107 (West 1986) (prohibits vagrancy, which is defined as begging or solicitation of alms by able bodied persons, though not begging or soliciting for "bona fide" religious and charitable organizations); Miss.Code Ann. § 97-35-37 (1972) (punishes vagrants, defined as able-bodied persons who beg for a livelihood).

[25] Ariz.Rev.Stat.Ann. § 13-2905(A)(3) (1989); Colo. Rev. Stat. § 18-9-112(2)(a) (1986); Del Code Ann. tit. 11 § 1321(4) (1987); Ala.Code § 13A-11-9(a)(1) (1982).

[26] Kan.Stat.Ann. § 21-4108 (1988) (prohibits vagrancy, which is defined as deriving "support in whole or in part from begging"); Minn.Stat.Ann. § 609.725 (West 1987) (same); Wisc.Stat.Ann. § 947.02(4) (West 1982); (same); Vt.Stat.Ann.

(continued...)

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Several American state courts have considered statutory or regulatory prohibitions similar to the type at issue in this case and have reached differing results. In *Ulmer*, 55 Cal.App.3d 263, 127 Cal.Rptr. 445, a California appellate court rejected a challenge based upon overbreadth and vagueness to § 647, subdivision (c), of the California Penal code. That provision stipulated that:

> Every person who commits any of the following acts is guilty of disorderly conduct, a misdemeanor: . . . (c) Who accosts other persons in any public place or in any place open to the public for the purpose of begging or soliciting alms.

55 Cal.App.3d at 265; 127 Cal.Rptr. at 447. The Court began with the assumption that because begging and soliciting alms did "not necessarily involve the communication of information or opinion," the practice of approaching people for those purposes was not protected speech. *Id.* Based upon its analysis of the legislative history of § 647, the Court concluded that the provision dealt

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[26](...continued)

tit. 13, § 3901 (1974) (vagrancy defined as transient person living without visible means of support who begs); Mass.Ann.Laws Chap. 272, §§ 63 & 64 (Law. Co-op.1980) (punishes tramps, which are described as persons begging or soliciting alms and having no residence in town within which act is committed); Mich.Comp.Laws Ann. § 750.167 (West 1968) (punishes disorderly person which is defined as any person found begging in public place). See also N.J.Stat.Ann. § 32:1-146.6 (West 1963) (codifying Port Authority rule which prohibits any person "unless duly authorized by the Port Authority, . . . (from) solicit[ing] alms").

specifically with the conduct of an individual who goes about the streets accosting others for handouts and that it was framed in order "to exclude from one ambit of the law the blind or crippled person who merely sits or stands by the wayside, the Salvation Army workers who solicit funds for charity on the streets at Christmas time and others whose charitable appeals may well be left to local control." *Id.* (quoting legislative history of California provision). Thus, the Court concluded that the statute was constitutional because it prohibited only active solicitation in the form of "[w]alking up to and approaching another for the purpose of soliciting," not the mere receipt of donations. 55 Cal.App.3d at 267; 127 Cal.Rptr. at 448.[27]

In *State ex rel. Williams* v. *City Court of Tucson*, 21 Ariz.App. 489, 520 P.2d 1166 (Ct.App.1974), an Arizona appellate court, in the process of rejecting a vagueness and overbreadth challenge to a statute virtually identical to New York Penal Law § 240.35(1) with the unstated assumption that begging was not protected speech, noted that:

> The word 'begging' in the ordinance we are considering refers to the solicitation of money or other valuable consideration without giving consideration in return. This

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[27] *See also People* v. *Tosch*, 114 Ill.2d 474, 103 Ill.Dec. 715, 501 N.E.2d 1253 (1986) *cert. denied* 483 U.S. 1008, 107 S. Ct. 3235, 97 L. Ed. 2d 740 (1987) (provisions which prohibited standing in a roadway and soliciting contributions except when permitted by municipal ordinance and provided that such solicitation could take place only at intersections where traffic came to a full stop and when the soliciting agency was registered with the Attorney General found to be a reasonable time, place and manner restriction).

> is undoubtedly what it would mean to a man of ordinary intelligence when read in the context of the subject ordinance.

520 P.2d at 1170. In dissent, Judge Krucker illustrated how the distinction between charitable solicitation and begging can easily become nothing more than a distinction based upon the status of the solicitor:

> For example, imagine the following situation at the corner of Congress and Stone in downtown Tucson: a group of Salvation Army workers soliciting contributions; (2) a blind man playing his accordion with a tin cup available for contributions; and (3) a group of 'hippie-type' individuals engaged in like conduct. No one would dispute that they are all doing exactly the same thing, namely, remaining in a public place for the manifest purpose of begging. I cannot envision a police officer, under these circumstances, arresting the Salvation Army people or the blind man. The fate of the less conventional individual, however, is more likely to be otherwise.
>
> Far-fetched though this illustration might appear, it serves to point up the evil denounced by [one of the early Supreme Court cases striking down loitering statutes].

Id. at 1172.

In *C.C.B.* v. *State of Florida*, 458 So.2d 47 (Dist.Ct.App.1984), a Florida appellate court held that a Jacksonville ordinance unconstitutionally infringed upon First Amendment speech. The ordinance provided:

> It shall be unlawful and a class C offense for anyone to beg or solicit alms in the street or public places of the city

> or exhibit oneself for the purpose of begging or obtaining alms.

Id. at 48. The Court distinguished *Ulmer* as a case involving an "accosting statute," and held that the Jacksonville ordinance was "unconstitutionally overbroad by its abridgment in a more intrusive manner than necessary, of the first amendment right of individuals to beg or solicit alms for *themselves*." *Id.* at 48-49 (emphasis in original). The Court recognized the city's "legitimate and compelling interest . . . to control undue annoyance on the streets and public places and prevent the blocking of vehicle and pedestrian traffic," but found that that interest should be protected through "less intrusive means than absolute preclusion." *Id.* at 48. The Court concluded that though "the city may *regulate* [begging] subject to strict guidelines and definite standards closely related to permissible municipal interests," it was "not entitled to absolutely prohibit a beggar's exercise of his freedom of speech . . ." *Id.* at 50 (emphasis in original).

These cases reveal that the constitutional protection afforded solicitation of money by beggars, as well as society's general attitude toward begging, are far from resolved. As for the specific principles articulated in these cases, the Court's decision in this case cannot rest upon the distinction between an "accosting statute" and a statute prohibiting begging, because unlike *Ulmer* none of the challenged provisions prohibits only panhandling or accosting for the purpose of begging. This case also does not involve regulations which place any narrowly tailored time, place or

manner restrictions on the plaintiffs' exercise of their First Amendment rights of the type alluded to in *C.C.B.*[28]

b) *Public Forum Analysis*

Having determined that begging can be expression protected by the First Amendment, the Court must then decide whether the New York City Transit System and the various facilities under the jurisdiction of defendants are traditional or designated public forums. The Supreme Court has held that restrictions placed upon the right of access to public property should be evaluated based upon the character of the property at issue and has distinguished three types of public property for First Amendment purposes: traditional public fora, designated public fora and non-public fora. *Perry Educ. Assoc.* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 44-46, 103 S. Ct. 948, 954-56, 74 L. Ed. 2d 794 (1983). Traditional public fora are those that have been devoted to free expression "by long tradition or by government fiat . . ." *Id.* at 45, 103 S. Ct. at 954. Non-public fora have not been recognized either by tradition or by designation as fora for public communication. *Id.* at 46, 103 S. Ct. at 955. Finally, even if the government is not required to create the forum or to retain the forum's open character indefinitely, it may create a designated public forum by opening the property for free expression. *Id.* at 45-46, 103 S. Ct. at 954-55.

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[28] The Court expresses no opinion as to whether the time, place or manner restrictions on charitable solicitations in the original TA regulation, if applied to plaintiffs' conduct, would have passed constitutional muster. As noted, *see supra* p. 345, plaintiffs do not contend otherwise.

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In *Wolin* v. *Port of New York Auth.*, 392 F.2d 83, 89-91, *cert. denied*, 393 U.S. 940, 89 S. Ct. 290, 21 L. Ed. 2d 275 (1968), the Second Circuit found that the Port Authority Terminal was an appropriate forum for the distribution of leaflets, carrying placards, setting up card tables and conducting discussions with passers-by. *See also Bright*, 71 N.Y.2d at 386-87, 526 N.Y.S.2d at 72, 520 N.E.2d at 1362. The Court stressed that because so many members of the public passed through the terminal, it was precisely the type of environment for free expression in a modern urban area. *Id.* at 90-91. After *Wolin*, there can be no dispute that the Port Authority Terminal and facilities similar to it are public fora.[29]

The Court must still decide whether the New York City Transit System also constitutes a public forum. Since defendants have completely banned begging and panhandling in the transit system, the Court need only decide that *some part* of the system is a traditional or limited public forum. Plaintiffs contend that by authorizing public speaking, the distribution of written non- commercial materials, artistic performances for donations, solicitation for religious and political causes, and solicitation for certain defined types of charities, the government has created a designated public forum. Defendants counter that by granting selective access to public property, the government does not automatically transform that property into a designated forum appropriate for all types of expression.

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[29] At the very least, a list of public fora would include Grand Central Station and Pennsylvania Station.

While the Supreme Court has held on several occasions that granting selective access to public property does not create a public forum, the Court as a matter of practice carefully analyzes the government's practice to determine whether it evidences an intent to open the forum to public assembly and debate. *Cornelius* v. *NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 802, 105 S. Ct. 3439, 3449, 87 L. Ed. 2d 567 (1985). In *Greer* v. *Spock*, 424 U.S. 828, 838 n. 10, 96 S. Ct. 1211, 1217 n. 10, 47 L. Ed. 2d 505 (1976), the Court found that inviting certain select civilian speakers and entertainers to appear at Fort Dix did not convert the Fort into a public forum where political candidates could conduct their campaigns. In *Perry*, 460 U.S. at 46-48, 103 S. Ct. at 955-57, even though a Board of Education had granted certain groups access to an interschool mail system and denied a teachers group similar access, the Board had not transformed the mail system into a public forum because there was no suggestion that the general public had been permitted access. In *Cornelius*, 473 U.S. at 814, 105 S. Ct. at 3455, the Federal Government excluded legal defense and political advocacy organizations from participation in a charity drive aimed at federal employees, but the Court found that the drive itself was not a designated public forum because the government's consistent policy had been to carefully limit the participants.[30]

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[30] *See also Calash* v. *City of Bridgeport*, 788 F.2d 80, 83 (2d Cir. 1986) ("Selective access by civic, charitable and non-profit organizations cannot be equated with 'indiscriminate use by the general public.'") (quoting *Perry*, 460 U.S. at 47, 103 S. Ct. at 956).

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The TA regulation does not carefully and selectively deny access to the general public as was the case in *Greer, Perry* and *Cornelius*. Instead, it authorizes a wide variety of different forms of expression by any member of the public who wishes to take part and explicitly excludes only panhandlers and beggars. In fact, the regulation authorizes the very conduct which plaintiffs wish to engage in by authorizing solicitations for religious and political causes and for certain charities.[31] Through its regulation, the TA tacitly acknowledges that parts of the transit system, with so much of the general public passing through them each day, are appropriate fora for such activity. Just as the Second Circuit in *Wolin* found that the admission of charitable solicitors, glee clubs and automobile exhibitions evidenced "the ease with which the [Port Authority] Terminal accommodates different forms of communication," 392 F.2d at 90, this Court finds that the scope of conduct authorized by the TA justifies the same conclusion with respect to segments of the transit system.[32] *See Lloyd Carew-Reid* v.

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[31] Plaintiffs asserted with respect to the earlier versions of the regulation, *see supra* p. 344, that the distinction made between solicitations for organized charity and begging were violative of their rights under the equal protection clause. Since defendant TA now totally bans begging, we need not reach this distinction.

[32] The physical nature of the subway tunnels and stations does not preclude their being designated a public fora. *See Penthouse Int'l Ltd.* v. *Koch*, 599 F. Supp. 1338 (S.D.N.Y.1984) (finding that by creating advertising display cases throughout New York subway system and by reserving them for use by advertisers

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Metropolitan Transit Authority, No. 89-7738, slip. op. at 13, 1990 WL 3216 (S.D.N.Y. January 5, 1990) (by permitting musicians to perform on subway platforms pursuant to 21 NYCRR 1050.6, TA designated subway platforms public fora for musical expression).

Defendants draw the Court's attention to the Second Circuit's assertion in *Gannett Satellite Info. Network, Inc.* v. *Metropolitan Transp. Auth.*, 745 F.2d 767, 773 (2d Cir. 1984), that MTA stations are neither a designated nor traditional public forum.[33] It should be noted at the outset, however, that *Gannett* was decided well before the TA adopted the regulations authorizing the forms of expression now permitted in segments of the transit system. Therefore, its conclusion that the transit system is not a designated public forum is of limited precedential value. Moreover, the *Gannett* Court acknowledged that public property which is neither a traditional nor a designated public forum may still serve as a forum for free expression if that expression is

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[32](...continued)

who paid a fee, TA made subway system a designated public forum for generating revenue through display of public advertisements); *Fernandes* v. *Limmer*, 663 F.2d 619, 626-27 (5th Cir. 1981), cert. dismissed, 458 U.S. 1124, 103 S. Ct. 5, 73 L. Ed. 2d 1395 (1982) (finding that narrow and crescent-shaped terminals crowded with thousands of travelers could be public fora).

[33] The *Gannett* Court ruled that the MTA stations were appropriate forums for newsrack newspaper sales, but that a licensing fee levied on these newsracks was a permissible manner restriction serving the significant government interest of raising revenue. 745 F.2d at 773-76.

"appropriate for the property." *Id.* As has been discussed above, the TA, through its regulation, tacitly acknowledges that the solicitation of money is appropriate in segments of the transit system.

c) *State Interests*

With respect to speech in a designated public forum, the state is bound by the same standards that apply in a traditional public forum. *Perry*, 460 U.S. at 46, 103 S. Ct. at 955. Time, place, and manner regulations which are content neutral must be narrowly tailored to serve a significant government interest and must leave open ample alternative channels of communication. *Id.* at 45, 103 S. Ct. at 954. The state may enforce a content-based exclusion only if it can show that the regulation is "necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Id.* Even blanket prohibitions of a particular type of speech in a public forum, such as the prohibitions at issue in this case, may sometimes be reasonable time, place or manner restrictions. *New York City Unemployed & Welfare Council* v. *Brezenoff*, 742 F.2d 718, 721 (2d Cir. 1984); *Knolls Action Project* v. *Knolls Atomic Power Laboratory*, 771 F.2d 46, 50 (2d Cir. 1985).[34] Therefore, the Court must consider the various state interests alleged to justify the blanket prohibitions enforced by the defendants in this case.

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[34] *See also Clark* v. *Community for Creative Non-Violence*, 468 U.S. 288, 104 S. Ct. 3065, 82 L. Ed. 2d 221 (1984) (blanket prohibition on symbolic sleep in Lafayette Park intended to highlight plight of homeless upheld as time, place and manner restriction).

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The first interest asserted by defendants is protecting the public from harassment and intimidation which it believes is inherent in a face-to-face confrontation with a beggar or panhandler. It is doubtful that either the TA provision or the Port Authority refusal to grant permits for begging can be considered narrowly tailored to serve this interest. Neither the TA nor the Port Authority makes any attempt to distinguish between an innocuous request for money and a threatening or intimidating demand. It should be noted that different TA regulations which are not challenged in this litigation already prohibit conduct which has "the reasonably intended effect of annoying, alarming or inconveniencing others, or otherwise tend[s] to create a breach of peace," 21 NYCRR 1050.7(i), which "interferes with the provision of transit service or obstruct[s] the flow of traffic on facilities or conveniences," 21 NYCRR 1050.6(a), or which "causes or may tend to cause harm or damage to any person . . ." 21 NYCRR 1050.7(k). Under the TA begging prohibition, the conduct of the blind beggar with a cup at his feet is prohibited in the same way as the machinations of the aggressive panhandler.

Moreover, no attempt is made to identify the specific vicinities where a passer-by is likely to face the harassment and intimidation associated with a face-to-face confrontation or where the passer-by becomes a captive audience. Plaintiffs have acknowledged the validity of restrictions which would preclude begging and all other forms of charitable solicitation on moving vehicles or near token booths, *see supra* p. 345, but defendants have thus far chosen not to pursue the alternative of adopting reasonable time, place or manner restrictions.

While the government has an interest in "preserv[ing] the quality of urban life," *City of Renton* v. *Playtime Theatres, Inc.*, 475 U.S. 41, 50, 106 S. Ct. 925, 930, 89 L. Ed. 2d 29 (1986), and in protecting citizens from "unwanted exposure to certain methods of expression which may legitimately be deemed a public nuisance," *Members of The City Council of L.A.* v. *Taxpayers for Vincent*, 466 U.S. 789, 805, 104 S. Ct. 2118, 2129, 80 L. Ed. 2d 772 (1984), this interest must be discounted where the regulation has the principal effect of keeping a public problem involving human beings out of sight and therefore out of mind. Indeed, it is the very unsettling appearance and message conveyed by the beggars that gives their conduct its expressive quality. Of course, the fact that expression is "objectionable to some . . . does not diminish its protected status . . ." *Young* v. *American Mini Theatres*, 427 U.S. at 85, 96 S. Ct. at 2459 (Stewart, J. dissenting).

Though *Schaumburg*, *Riley*, and *Munson* each struck down antifraud provisions as constitutionally defective, the Court recognized a state interest in preventing a charitable solicitor from deceiving donors as who would receive the benefits of the solicitation. *See supra* pp. 351-52. With the conduct at issue in this case, the likelihood of that type of fraud is greatly reduced. A passer-by who donates a small sum of money to a beggar knows that the beggar will in all likelihood keep the money. The passers-by make a calculated decision that the individual is worthy in some respect of their donation. While a beggar may attempt to present himself as more needy than he really is, he will almost never attempt to create the impression that the money is going to anyone but himself. Furthermore, on a more general level, defendants do not contend that a beggar or panhandler is any

more likely to lie than any other speaker protected by the First Amendment.

3. The Challenged Provisions

Having determined that New York Penal Law § 240.35(1) violates the due process clause of the New York Constitution, that begging can be expression protected by the First Amendment, that the prohibitions at issue inhibit conduct in designated public fora, and that neither of the prohibitions is narrowly tailored to serve a significant state interest, the Court will now consider the effect of these conclusions on the individual provisions.

a) *21 NYCRR 1050.6(b) & (c) (Transit Authority)*

Because 21 NYCRR 1050.6(b) burdens constitutionally protected speech by plaintiffs in designated public fora and is not narrowly tailored to serve a significant state interest, there are serious questions as to its constitutionality both on its face and as applied to plaintiffs. The regulation totally bans panhandling and begging upon any facility or conveyance within the jurisdiction of the TA. The TA has made no effort to tailor the provision narrowly to protect the various state interests discussed above. Finally, parts of the transit system are clearly designated public fora, where a total prohibition of protected speech which is not a reasonable time, place or manner restriction, such as the prohibition in 21 NYCRR 1050.6(b), runs afoul of the Constitution.

b) *21 NYCRR 1220.16; 21 NYCRR 1220.25; 21 NYCRR 1290.3 (Port Authority)*

The Port Authority rules prohibit any person from "solicit[ing] funds or contributions for any purpose" or from

"soliciting alms" in the Port Authority Bus Terminal without "permission" or unless "duly authorized by the Port Authority." 21 NYCRR 1220.20 & 1220.16. In the World Trade Center, no person "unless duly authorized in writing by the Port Authority" is permitted to "solicit funds for any purpose." 21 NYCRR 1290.3. The Port Authority represents that pursuant to the regulations permits are issued for First Amendment activities on a first come first serve basis. Because the Port Authority believed that the state penal provision prohibited begging, permits were not issued for begging and panhandling. Since § 240.35(1) violates the due process clause of the New York Constitution, the Port Authority can no longer enforce that provision by denying permits to beggars and panhandlers. Moreover, pursuant to the analysis presented in this opinion, the Port Authority can no longer enforce its total ban on begging. The Court will not speculate, however, as to what the Port Authority can do or will do in the absence of Penal Law § 240.35(1). We note again that conduct which is proscribed as unlawful must be clearly defined, especially when First Amendment rights are impacted. We find that enforcement of any ban on panhandling, begging or soliciting alms pursuant to the Port Authority rules should be preliminarily enjoined.

III. CONCLUSION

A true test of one's commitment to constitutional principles is the extent to which recognition is given to the rights of those in our midst who are the least affluent, least powerful and least welcome. Believing that the challenged provisions, which totally ban solicitations of charity for the benefit of the solicitor in areas controlled by the defendants which are well recognized to be places where First

Amendment rights may be exercised, violate the constitutional rights of the plaintiff class, we grant the motion for a preliminary injunction.

This determination is of course without prejudice to the right of the MTA and Port Authority to adopt and implement reasonable time, place and manner restrictions. Consideration should be given to restrictions which, for example, might prohibit begging on moving vehicles, areas adjacent to token or ticket booths, on narrow platforms, or at the head or foot of escalators or stairways. It is the total prohibition of *all* begging on *all* of defendants' facilities which is constitutionally impermissible. The existing provisions banning conduct which harasses, menaces, impedes traffic or otherwise causes harm are not challenged in this case and remain in force. *See supra* p. 358. There should be relatively little difficulty in designing a regulatory scheme which can reasonably accommodate the interests of both the members of the plaintiff class and the interests of those who operate or use the defendants' facilities.

Reasonable time, place and manner restrictions would not only confront the constitutional infirmities which invalidate the present regulatory scheme but would provide greater guidance to defendants' law enforcement officers. The present overbroad prohibitions not only infringe upon constitutional rights, but, as a practical matter, they may become largely unenforceable by virtue of their overbreadth. Thus, the absolute prohibitions may serve no purpose other than to threaten the exercise of constitutional rights.

For the reasons stated in this opinion, defendants are preliminarily enjoined from enforcing, pursuant to 21 NYCRR 1050.6, 21 NYCRR 1220.25, 21 NYCRR 1290.3,

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21 NYCRR 1220.16 and New York Penal Law § 240.35(1) as they now read, any prohibition on begging, panhandling or soliciting alms by the plaintiff class. Defendants are further enjoined from circulating pamphlets, exhibiting posters or using any other method to announce that such conduct is unlawful. Defendants are to undertake all reasonable efforts to delete language from pamphlets and posters currently in circulation which announces that such conduct is unlawful. This may be accomplished, in part, by a paste-over obscuring the offending language which appears on a single line of the TA posters. Plaintiffs' motions to amend their complaint and for an order determining that this action is maintainable as a class action are granted.

SO ORDERED.

APPENDIX C

Order of the Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket Nos:
90-7115
90-7137 & 90-7183

WILLIAM B. YOUNG, JR., and JOSEPH WALLEY, on behalf of themselves and all other persons who are similarly situated; and LEGAL ACTION CENTER for the HOMELESS,

Plaintiffs-Appellees,

SHERON GILMORE,

Plaintiff-Intervenor-Appellee,

-v.-

NEW YORK CITY TRANSIT AUTHORITY, METROPOLITAN TRANSPORTATION AUTHORITY OF THE STATE OF NEW YORK, METRO-NORTH COMMUTER RAILROAD COMPANY, THE LONG ISLAND RAIL ROAD COMPANY, THE PORT AUTHORITY OF NEW YORK and NEW JERSEY, and ROBERT R. KILEY, as Chairman of the New York City Transit Authority, the Metropolitan Transportation Authority of the State of New York, the Metro-North Commuter Railroad Company,

Order of the Court of Appeals for the Second Circuit

and the Long Island Rail Road Company, and ROBERT ABRAMS, as Attorney General of the State of New York,

Defendants-Appellants,

PHILIP D. KALTENBACHER, Chairman, ROBERT F. WAGNER, SR., Vice-Chairman, HAZEL FRANK GLUCK, JAMES G. HELLMUTH, HENRY F. HENDERSON, JR., WILLIAM K. HUTCHISON, RICHARD C. LEONE, BASIL PATTERSON, JOHN G. MCGOLDRICK, WILLIAM J. RONAN, HOWARD SCHULMAN, and ROBERT VAN BUREN, as the Board of Commissioners of the Port Authority of New York and New Jersey,

Appellants.

Petitions for rehearing containing suggestions that the action be reheard en banc having been filed herein by counsel for the plaintiff-intervenor-appellee, SHERON GILMORE and by counsel for the plaintiffs-appellees, WILLIAM B. YOUNG, JR., et al.,

Upon consideration by the panel that heard the appeal, it is

Order of the Court of Appeals for the Second Circuit

ORDERED that said petitions for rehearing are DENIED.

It is further noted that the suggestions for rehearing en banc having been transmitted to the judges of the Court in regular active service and to any other judge that heard the appeal and a poll of said judges having been taken, a majority of the Court has voted not to reconsider the decision en banc. Chief Judge Oakes, Judges Meskill, Newman and Kearse dissent from the denial of rehearing en banc.

ELAINE B. GOLDSMITH
Clerk

APPENDIX D

D1

Orders of the United States District Court for the Southern District of New York

89 Civ. 7871 (LBS)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

WILLIAM B. YOUNG, JR., et al.

Plaintiffs,

v.

NEW YORK CITY TRANSIT AUTHORITY, et al.

Defendants.

IT IS HEREBY ORDERED ON CONSENT OF THE PARTIES THAT:

1. The preliminary injunction granted pursuant to this Court's order of January 25, 1990 is made permanent without prejudice to the right of the plaintiffs to reassert their claims that the statute and regulations here in question if valid on their face are nevertheless invalid as applied to the plaintiff class.

2. The Court directs that the claims of plaintiffs challenging the facial constitutionality of New York Penal Law Sec. 240.35(1), 21 NYCRR 1050.6, 21 NYCRR 1220.25, 21 NYCRR 1290.3, and 21 NYCRR 1220.16 be severed and that judgment be entered declaring said statute and provisions unconstitutional on their face for the reasons

stated in the Court's opinion and order of January 25, 1990, there being no just reason for delay in judgment.

3. This case and all discovery hereunder shall be placed on suspense pending completion of the appellate process.

4. Pending completion of the appellate process, the injunction granted pursuant to the Opinion of January 25, 1990 is stayed on the following conditions:

1) That all parties will join in an application to the Court of Appeals for the Second Circuit for expedited appellate review, and will seek no adjournments or delays in the appellate proceedings;

2) During pendency of the appeal to the Court of Appeals for the Second Circuit, defendants may prohibit begging and panhandling only in those areas and under those conditions in which charitable solicitation was prohibited at the time of the filing of the First Amended Complaint, i.e., December 26, 1989; defendants need not alter the posters presently displayed; and the defendants may not make any further distribution of any poster or other printed material containing a ban on begging or panhandling.

5. The application of the defendants Metropolitan Transportation Authority, New York City Transit Authority, Metro-North Commuter Railroad, Long Island Rail Road, Robert R. Kiley and the Port Authority of New York and New Jersey for a stay of the injunction not conditioned as set forth in this order is denied.

SO ORDERED.

Dated: February 2, 1990
New York, New York

/s/ Leonard B. Sand
United States District Judge

Orders of the United States District Court for the Southern District of New York

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

WILLIAM B. YOUNG, JR., et al.

Plaintiffs,

-against-

NEW YORK CITY TRANSIT AUTHORITY, et al.

Defendants.

89 Civ. 7871 (LBS)

ORDER

SAND, J.

It is hereby ordered that this action be transferred to the suspense docket of this Court pending completion of the appellate process.

The parties are to advise the Court of the status of this action on April 2, 1990 and every sixty days thereafter.

SO ORDERED.

Dated: February 2, 1990
New York, New York

/s/ Leonard B. Sand
United States District Judge

APPENDIX E

E1

Text of Constitutional and Regulatory Provisions Involved

The First Amendment to the United States Constitution provides, in pertinent part:

> Congress shall make no law * * * abridging the freedom of speech, or of the press * * *.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

New York Comp. Codes R. and Regs., tit. 21, § 1050.6 provides as amended:

> Use of the transit system. (a) No person may vandalize or attempt to vandalize any facility or conveyance, or perform any act which causes or may tend to cause harm or injury to any person, facility or conveyance, interfere with the provision of transit service or obstruct the flow of traffic on facilities or conveyances or which would in any way interfere or tend to interfere with the safe and efficient operation of the facilities or conveyances of the Authority.
>
> (b) No person, unless duly authorized by the Authority, shall engage in any commercial activity upon any facility or conveyance. Commercial

activities include (1) the advertising, display, sale, lease, offer for sale or lease, or distribution of food, goods, services or entertainment (including the free distribution of promotional goods or materials), and (2) the solicitation of money or payment for food, goods, services or entertainment. No person shall panhandle or beg upon any facility or conveyance.

(c) Except as expressly authorized and permitted in this subsection (c), no person shall engage in any non-transit uses upon any facility or conveyance. Non-transit uses are non-commercial activities that are not directly related to the use of a facility or conveyance for transportation. The following non-transit uses are authorized and permitted by the Authority, provided they do not impede transit activities and they are conducted in accordance with the Rules governing the conduct and safety of the public in the use of facilities of New York City Transit Authority and Manhattan and Bronx Surface Transit Operating Authority: public speaking; distribution of written non-commercial materials; artistic performances, including the acceptance of donations; solicitation for religious or political causes; solicitation for charities that (1) have been licensed for any public solicitation within the preceding twelve months by the Commissioner of Social Services of the City of New York under § 21-111 of the Administrative Code of the City of New York or any successor provision, or (2) are duly registered as charitable organizations with the Secretary of State of the State of New York under § 172 of the New York

Executive Law or any successor provision, or (3) are exempt from Federal income tax under § 501(c)(3) of the United States Internal Revenue Code or any successor provision. Solicitors for such charities shall provide, upon request, evidence that such charity meets one of the preceding qualifications.

(1) Permitted non-transit uses may be conducted in the transit system except when on or within: a subway car; an omnibus; any area not generally open to the public; twenty-five (25) feet of a token booth; or fifty (50) feet from the marked entrance to an Authority office or tower. The following activities are not subject to the distance requirements from a token booth or Authority office or tower: leafletting or distribution of literature, campaigning, public speaking or similar activities, provided that no sound production device is used and no physical obstruction, such as a table or other object, is present.

(2) In no event will an activity be permitted in a location which interferes with the access onto or off of an escalator, stairway or elevator, or otherwise interferes with or impedes transit services or the movement of passengers.

(3) No activity permitted by this authorization shall be conducted on a subway platform while construction, renovation or maintenance work is actively underway on or near the platform, or on or near the staircases, escalators, or elevators leading to the platform and including any such work in or near track areas.

(4) No activity may be permitted which creates excessive noise or which emits noise that interferes with transit operations. The emission of any sound in excess of 85 dBA on the A weighted scale measured at five (5) feet or 70 dBA measured at two (2) feet from a token booth is excessive noise and is prohibited. In no event will the use of amplification devices of any kind, electronic or otherwise, be permitted on subway platforms.

(5) No person shall use media devices such as films, slides or videotapes.

(6) No person shall conduct or continue to conduct an activity permitted by this authorization which includes the use of a sound production device during any announcement made over the public address system or by a Transit Police Officer or by an Authority employee.

(7) No person shall misrepresent through words, signs, leaflets, attire or otherwise such person's affiliation with or lack of affiliation with or support by any organization, group, entity or cause, including any affiliation with or support by the Authority or the Metropolitan Transportation Authority or any of their programs, such as Music Under New York or Arts for Transit.

(8) Any person using the transit system for non-transit activities permitted pursuant to this rule does so at his or her own risk, and the Authority assumes no liability by the grant of this authorization.

(d) All persons on or in any facility or conveyance of the Authority shall:

(1) comply with all lawful orders and directives of any Transit Police Officer or other Authority employee acting within the scope of his or her employment;

(2) obey any instructions on notices or signs duly posted on any Authority facility or conveyance; and

(3) provide accurate, complete and true information or documents requested by Transit Police Officers or other Authority personnel acting within the scope of their employment and otherwise in accordance with law.

(e) Persons not in wheelchairs occupying any location on a conveyance designated for use by persons in wheelchairs shall immediately vacate such location if required to accommodate a wheelchair-bound person. Further, passengers aboard buses equipped with wheelchair lift devices, shall conduct themselves in a manner which will not impede the operation of such lifts, impede the securing of wheelchairs in the tie-down devices located on such buses or impede the exit of such passengers in wheelchairs.

(f) No person shall bring or carry on a conveyance liquid in an open container.

(g) No person shall falsely represent himself or herself as an agent, employee or representative of the Authority or falsely represent himself or

herself as a member of the Transit Police Department.

New York Comp. Codes R. and Regs., tit. 21, § 1050.7 provides:

> Disorderly Conduct. No person on or in any facility or conveyance shall:
>
> (a) Litter, dump garbage, liquids or other matter, create a nuisance, hazard or unsanitary condition (including, but not limited to, spitting, urinating, except in facilities provided). Trash and other waste materials contained in waste receptacles shall not be removed, except by persons duly authorized by the Authority.
>
> (b) Smoke or carry an open flame or lighted match, cigar, cigarette, pipe or torch, except in those areas or locations specifically designated by the Authority as authorized for smoking.
>
> (c) Sleep or doze where such activity may be hazardous to such person, to others or may interfere with the operation of the Authority's transit system or the comfort of its passengers.
>
> (d) Engage in any form of gambling, except as specifically authorized as, for example, at OTB parlors.
>
> (e) Create any unnecessary noise through the use of any sound production device. Use of radios and other devices listened to solely by headphones or earphones and inaudible to others is permitted.

(f) Throw, drop or cause to be propelled any stone, projectile or other article at, from, upon, in or on a facility or conveyance.

(g) Drink any alcoholic beverage or possess any opened or unsealed container of alcoholic beverage, except on premises duly licensed for the sale of alcoholic beverages, such as bars and restaurants.

(h) Enter or remain in any facility or conveyance while his or her ability to function safely in the environment of an Authority transit system is impaired by the consumption of alcohol or by the taking of any drug.

(i) Conduct himself or herself in any manner which has the reasonably intended effect of annoying, alarming or inconveniencing others, or otherwise tending to create a breach of the peace.

(j) Occupy more than one seat on a station, platform or conveyance, or block free movement on a station, stairway, platform or conveyance.

(k) Commit any act which causes or may tend to cause harm or damage to any person, facility, conveyance or interfere with service or obstruct the operation of the Authority.

APPENDIX F

Plaintiffs' and Intervenors' Affidavits

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

WILLIAM B. YOUNG, JR., and JOSEPH WALLEY, on behalf of themselves and all other persons who are similarly situated; and, LEGAL ACTION CENTER FOR THE HOMELESS,	:	
Plaintiffs,	:	
-against-	:	89 Civ. 7871 (LBS)
NEW YORK CITY TRANSIT AUTHORITY, METROPOLITAN TRANSPORTATION AUTHORITY OF THE STATE OF NEW YORK, METRO-NORTH COMMUTER RAILROAD COMPANY, THE LONG ISLAND RAIL ROAD COMPANY, THE PORT AUTHORITY OF NEW YORK and NEW JERSEY, and ROBERT R. KILEY, as Chairman of the New York City Transit Authority, the Metropolitan Transportation Authority of the State of New York,	:	SUPPLEMENTAL AFFIDAVIT OF WILLIAM B. YOUNG, JR.

Plaintiffs' and Intervenors' Affidavits

the Metro-North Commuter
Railroad Company, and :
the Long Island Rail
Road Company, :

Defendants. :
- x

State of New York)
ss.:
County of New York)

WILLIAM B. YOUNG, JR., having been duly sworn, deposes and says:

1. I am homeless and frequently sleep in public shelters. If I can afford to, I rent a room for the night.

2. I survive by asking people for charity, and by unloading trucks and other work, when I am able to. I do not presently receive any welfare, except for food stamps.

3. I speak with people and ask them for money in subway stations, such as Grand Central, Times Square, Herald Square, Union Square, Columbus Circle, Pennsylvania Station, World Trade Center, and Port Authority Bus Terminal. I also solicit money on subway platforms and on the underground streets that connect stations and platforms.

4. When I speak with people I tell them that I am homeless. I ask them for money. I do not get in anybody's way. If they ask me to go away, then I leave. I tell them that with a few dollars, I can get food and take the subway to the unloading docks in the Bronx, where if I am lucky I

can make twenty dollars unloading trucks for the day. I tell them that then I can rent a room for the night. Many times they ask me questions like, "Why are you homeless?", "Why are you asking for money and why should I give it to you?" "Why don't you have a job?", "Don't you get welfare, so why are you asking me for money?" or "Can't you sleep for free in a shelter?". Sometimes as many as five or six people will be questioning me like this. I tell them that social services in New York City are designed to keep people in -- designed to maintain and contain -- and are not designed to help them get back on their feet. I tell them you can waste a whole day trying to speak with a bureaucrat, who only gives you a few moments of his time and then refers you elsewhere, with nothing accomplished. I tell them that the public shelters are dangerous places, where violence often occurs and the few belongings I have might easily be stolen. Sometimes, if they are willing to listen, I tell them these things even when they do not ask, because I think they should know.

5. I spend the money I receive soliciting on the basic necessities of life, that is, on food, shelter, clothing, transportation, and medicine. I cannot emphasize enough how much I need this money for my medicine. Since I do not receive public assistance, I am not on Medicaid. I have a bleeding ulcer and high blood pressure. I often need to take each day four pills for my ulcer and two pills for my blood pressure. The ulcer pills cost about twenty dollars for a bottle of thirty, and the blood pressure pills cost about seven dollars for a bottle of thirty.

6. During the past few weeks, on a number of occasions when I was speaking with people, the New York City Transit Authority police stopped me from continuing to talk to these people. They told me that I could not

panhandle, and that they would arrest me if they caught me doing it again. Sometimes, I had not even asked anyone for money. Sometimes, the police made me leave a subway station, or when I was on a subway platform, they said I should be on the next train no matter where it was going. Other times they only told me I should "move on," and that they did not want me panhandling on their beat, but that they did not care if I did it on someone else's beat.

7. During the past few weeks, I have seen pamphlets at the subway token booths and posters in the subway stations and in the subway trains that state that anyone panhandling can be arrested or fined.

8. I am afraid to speak with people in subway stations, on subway platforms, and on the underground streets that connect different stations and platforms. I am afraid to ask people for money. I am afraid that the New York City Transit Authority police will say that I am panhandling, and that they will then arrest me or fine me. I am afraid of this because of the pamphlets and posters and because of what the police have said and done to me during the past few weeks.

9. I am afraid that with the harsh cold of winter that I may die if I cannot stay underground where it is warmer, and there ask people for money.

10. I believe I have the right to speak freely, and so may ask another for help.

/s/ William B. Young, Jr.
WILLIAM B. YOUNG, JR.

Subscribed and sworn to this
6th day of December, 1989.

/s/
Notary Public

Plaintiffs' and Intervenors' Affidavits

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

WILLIAM B. YOUNG, JR., and JOSEPH WALLEY, on behalf of themselves and all other persons who are similarly situated; and, LEGAL ACTION CENTER FOR THE HOMELESS,	:	
Plaintiffs,	:	89 Civ. 7871 (LBS)
-against-	:	SUPPLEMENTAL AFFIDAVIT OF
NEW YORK CITY TRANSIT AUTHORITY, METROPOLITAN TRANSPORTATION AUTHORITY OF THE STATE OF NEW YORK, METRO-NORTH COMMUTER RAILROAD COMPANY, THE LONG ISLAND RAIL ROAD COMPANY, THE PORT AUTHORITY OF NEW YORK and NEW JERSEY, and ROBERT R. KILEY, as Chairman of the New York City Transit Authority, the Metropolitan Transportation	:	JOSEPH WALLEY

Plaintiffs' and Intervenors' Affidavits

Authority of the State of New York, the Metro-North Commuter Railroad Company, and the Long Island Rail Road Company,

Defendants.

State of New York)
ss.:
County of New York)

JOSEPH WALLEY, having been duly sworn, deposes and says:

1. I have been homeless and sleeping in shelters or parks for over four and one half years, this past week the New York City Human Resources Administration paid for me to sleep at a Young Man's Christian Association.

2. I am fifty years old and unable to find work. I receive food stamps and public assistance at the rate of ninety-one dollars and fifty cents ($91.50) every two weeks. When I sleep in a public shelter this is reduced to twenty-one dollars and fifty cents ($21.50). This is not enough to live on and so I ask people for money.

3. I solicit money throughout the subway system, in the stations, on the underground streets between stations and platforms, and on the platforms, including, Pennsylvania Station, Port Authority Bus Terminal, Grand Central, Times Square, Herald Square and Columbus Circle. I find a spot

where passersby can easily see me and give me money if they wish, but where I am not in their way. I ask people for money as they go by. Sometimes I hold a cup and just rattle it. I believe that just by standing there I am making a statement to those who walk by that they should help others in need. Sometimes people stop and ask me questions. I tell them what it's like to be homeless. I tell them that there are some good private charities, but that the public welfare system does not really care about people.

4. The New York City Transit Authority police have recently told me several times that I may not ask people for money, or simply stand holding my cup. They told me that panhandling was against the law and I could be arrested. The police have evicted me from the subway. They have also told me to go somewhere else in the subway away from where they were.

5. I have seen flyers and posters in the subway stating that panhandling is a violation that can lead to an arrest or a fine.

6. Because of the flyers and posters and my recent encounters with the police, I am afraid to either ask people for money or stand with my cup, while anywhere in the subway system.

7. It is cold outside and I am afraid I may become seriously ill because it is against the law to ask people for money or stand with my cup, in the warmth of the subway system.

8. I believe it is wrong to silence the homeless, so that they cannot speak out, and ask for help.

/s/ Joseph Walley
JOSEPH WALLEY

Subscribed and sworn to this
6th day of December, 1989.

/s/
Notary Public

Plaintiffs' and Intervenors' Affidavits

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Sheron Gilmore, Plaintiff, -against- Robert R. Kiley, in his official capacity as Chairman of the New York City Transit Authority; David L. Gunn, in his official capacity as President of the New York City Transit Authority; and the New York City Transit Authority, Defendants.	:	89 Civ.

AFFIDAVIT

State of New York)
SS.:
County of New York)

I, Sheron Gilmore, depose and state:

1. I currently reside in New York City. For six years, until last month, I was homeless, and lived in shelters and on the streets.

2. For the past six years, I have supported myself in part through charity that I have solicited in the New York City subway system.

3. I receive welfare benefits and food stamps, but these are not enough to last through the month. I am in a position where frequently the only way I will have any money to buy food for a day is through soliciting on the subways. I do it because I am hungry and need to eat.

4. I also solicit money for carfare to take me to a medical clinic, where I go regularly to be treated for a respiratory ailment.

5. When I solicit, I simply ask people for money with which to buy food. If they do not want to give, they simply keep walking.

6. I am afraid that if I am not allowed to solicit money on the subway, particularly in the winter when it is too cold to remain on the streets, I will not have enough to eat.

7. My request for money, in addition to being a means of support, is a way in which I communicate my belief that the government is not doing enough to protect poor citizens and provide them with food and shelter. When I ask people for money, I usually also say that I have no money to buy food.

8. Frequently, my solicitation is the start of a conversation between myself and the person who hears it. I am often asked by people why I have to solicit money in this way, and why the government is not taking care of poor people. People often want to know where their tax money is going, since so many people are clearly not being taken care of. I have engaged in many political discussions,

sometimes for up to an hour, that started from my initial request for money.

9. Transit Authority police frequently harass me and attempt to prevent my from speaking. Sometimes, they have come up to me while I am speaking and ordered me to stop speaking and leave the subway system.

10. On many occasions, the Transit Police have threatened to arrest me if I did not leave the subway system.

11. I am aware of "Operation Enforcement," and I am afraid that I will be arrested if I continue to ask people for money in the subway system. The Transit Authority's rule is making me reluctant to continue soliciting money in the subway system. I am afraid of going to jail.

12. I have made no prior request for the relief I seek.

13. This affidavit has been read to me.

/s/ Sheron Gilmore

SHERON GILMORE

Sworn to me the 1st day of
December, 1989.

/s/

Notary Public